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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,

Petitioner,

v.

STATE OF ALABAMA ex rel.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Does a state court injunction against a citizen's filing a federal *in personam* civil action for damages, on the ground that the federal action is "connected with" and would be an "interference" with a state court proceeding, but when the federal action would not and cannot disturb the state court's control of property or any *res*,

(1) violate the rule announced by this Court in *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), forbidding such injunctions?

(2) encroach on the jurisdiction of the federal courts in violation of Article III and the Supremacy Clause (Article VI) of the Constitution?

(3) abridge the right of petitioner to petition the courts for redress of grievances, in violation of the First Amendment?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Shearn Moody, Jr., hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama denying his petition for a writ of mandamus in this case.[1]

OPINIONS BELOW

The opinion of the Supreme Court of Alabama issued July 30, 1982, is reproduced as Appendix A. The opinion of the Circuit Court of Jefferson County, Alabama, issued February 5, 1982, is reproduced as Appendix B.

[1]The caption of the case in this Court contains the names of all the parties. Hon. William C. Barber, Judge, Circuit Court of Jefferson Couty, was a nominal party below as respondent to the petition for a writ of mandamus.

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama were issued on July 30, 1982. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III:

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

Article VI, Cl. 2:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

First Amendment:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Summary

This case presents the issues of one individual's loss of his right to access to the federal courts and of the power of the states generally to restrict access to the federal courts.

This Court strictly limits a state's power to enjoin a citizen from commencing federal litigation. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), applying *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939), applied in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). A state may enjoin federal litigation only in the narrowest of circumstances; that is, (1) when a state court or its officer has possession of property pursuant to *in rem* proceedings, and (2) when the federal litigation also is *in rem* or *quasi in rem*, and would or could have the federal "court, or its officer," wrest "possession or . . . control" of that property from the state court. *Princess Lida*, 305 U.S. at 466. But a state court may not enjoin federal litigation that is only *in personam*, that is, which seeks only money damages and does not seek to disturb a state court's jurisdiction over or possession of a *res*. It may not do so even if the federal case seeks to relitigate issues already decided in the state court, or even if the federal case is deemed vexatious or harassing. *General Atomic*, 434 U.S. at 15, 17; *Donovan*, 377 U.S. at 412.

The Alabama Supreme Court decision petitioner asks this Court to review denied him the right to bring a purely *in personam* action in the federal courts of Texas. The Alabama decision did not find that petitioner's proposed lawsuit (App. C) was *in rem* or *quasi in rem*. It did not find that petitioner's lawsuit would or could have the federal "court, or its officer" take "possession or . . . control" of property in control of the state court. Instead Alabama forbids petitioner to file a lawsuit that, it recognized, sought only money damages, on the ground that it was "inextricably connected with the . . . receivership" and that therefore to permit it "would be an interference with the receivership." App. A pp. 1, 2.

The issue is especially important here because thirty-two other states now have insurance receivership statues like Alabama's, which broadly permit injunctions against litigation. App. D. Like Alabama's, none of these statutes limit their reach to what is permitted by *Donovan v. City of Dallas*. Alabama's "connected with" and "interference" test encompasses much that would in no way disturb the state court's "control" or "possession" of the *res*, the assets of the company subject to receiver-

ship. Under all 33 statutes, any federal court *in personam* action for damages arising from acts "connected" with an insurance receivership (for example, as in this case, an alleged conspiracy to reduce competition in the insurance business (App. C p. C11)), could be construed as a potential "interference" with the receivership.[2]

The Alabama Supreme Court decision here rewrites the *Donovan* rule without even citing it. If let stand, it presages a wholesale jettison of *Donovan* in a significant realm of litigation. *See* App. E. If state power is to be expanded in this way, if citizens' access to the courts is to be restricted in this way and if the power of federal courts to determine their own jurisdiction is to be reduced in this way, it should be only after full and careful consideration by this Court.

* * *

Petitioner has sought review of Alabama's injunction against his institution of litigation on earlier occasions. On those occasions the *Donovan* issue either was muddied with other issues and was not clearly presented on the merits[3] or was raised

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[2] *See* 5 Oxford English Dictionary 395 (1933 ed., 1970 Repr.):

> **Interference.**
>
> 1. The action or fact of interfering or intermeddling (*with* a person, etc., or *in* some action). (emphasis in original)
>
> * * *
>
> **Interfere.**
>
> * * *
>
> 2. Hence, of things generally: To strike against each other; to come into physical collision; to collide or clash, so as to hamper or hinder each other: to get in each other's way, cross each other's path.
>
> * * *
>
> 4. a. Of things, actions, etc: To come into collision or opposition, so as to affect the course of.
>
> b. Of persons: To meddle *with;* to interpose and take part in something, esp. without having the right to do so; to intermeddle. (emphasis in original)

[3] Moody v. State ex rel. Payne, 355 So.2d 1116 (Ala.), *cert. denied,* 439 U.S. 910 (1978); Moody v. State ex rel. Payne, 351 So.2d 552

in collateral proceedings brought under the Full Faith and Credit clause,[4] and in each case the court at least purported to follow *Donovan*.[5] In the decision of which review is now sought, the *Donovan* issue is squarely presented, is the only issue presented, and the Alabama Supreme Court has forgone even lip service to the *Donovan* rule.

Proceedings Below

Petitioner is a citizen and resident of Texas. He is the principal stockholder and was the president of the Empire Life Insurance Company of America ("Empire"), an Alabama insurance company doing business in interstate commerce. In 1972 the Circuit Court for Jefferson County, Alabama, placed Empire in receivership. In 1974 the court ordered Empire liquidated and turned over its assets and its insurance in force to Protective Life Insurance Company, which had been a competitor of Empire.

On January 6, 1975, at the receiver's instance, the circuit court enjoined petitioner from "filing, financing, sponsoring, initiating, or aiding in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court . . . on behalf of any party" against the receiver, the receivership, or with respect to any claim affecting the affairs of Empire Life or the receivership without first obtaining the circuit court's permission. On appeal the Alabama Supreme Court expressly acknowledged the authority of *Donovan*, but found that petitioner's suit was attempting to remove possession of the *res* from the receivership court. *Moody v. State ex rel. Payne*, 329 So.2d 73, 78, 80 (Ala. 1976).

Meanwhile, in April 1975, the circuit court found petitioner in violation of its injunction for aiding an Empire policyholder

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(Ala. 1977), *cert. denied*, 435 U.S. 964 (1978); State ex rel. Payne v. Empire Life Insurance Co., 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978); Moody v. State ex rel. Payne, 329 So.2d 73 (Ala. 1976).

[4]Sumrall v. Moody, 620 F.2d 548 (5th Cir. 1980), *on reh.*, 632 F.2d 1351 (5th Cir. 1980), *cert. denied sub nom.* Moody v. Forresster, 450 U.S. 1026 (1981).

[5]*See* discussion at pp. 5-6, *infra*.

to amend a complaint the policyholder had filed against the receiver in federal court,[6] and fined him $250,000 (payable as "damages" to the receiver and Protective). *Moody v. State ex rel. Payne*, 355 So.2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978); *see also State ex rel. Payne v. Empire Life Insurance Co. of America*, 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978). The receiver and Protective successfully sued petitioner to collect the $250,000, the Fifth Circuit holding that the full faith and credit clause controlled and that *Donovan* was satisfied.[7] *Sumrall v. Moody*, 620 F.2d 548 (5th Cir. 1980),[8] *on reh.*, 632 F.2d 1351 (5th Cir. 1980), *cert. denied sub nom. Moody v. Forresster*, 450 U.S. 1026 (1981).

In 1976, the Circuit Court denied petitioner's request for permission to file a federal civil action. On appeal, the Alabama Supreme Court held that "the proposed litigation was nothing more than [a] ploy of Moody's to interfere with, delay and eventually stop the Empire receivership proceeding", the proposed federal case "inextricably involve[d] the Empire receivership proceeding," and therefore the *Donovan in rem* exception applied. *Moody v. State ex rel. Payne*, 351 So.2d at 555.[9]

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[6]Allmon v. Bookout, Civ. No. 74-377-N (M.D. Ala.).

[7]*Allmon* sought injunctive relief which, the Fifth Circuit found, "if granted as sought, the receivership would have been terminated, *and possession of all assets of Empire would have been taken away from the Receiver.*" 632 F.2d at 1352 (emphasis added).

[8]The Fifth Circuit also expressed impatience with what it regarded as petitioner's excessive zeal in pursuing in the courts vindication of what he has viewed as unconstitutional action to deprive him of constitutional rights. 620 F.2d at 550-51, nn. 1, 2.

[9]In that case the Circuit Court at first had permitted petitioner to file a counterclaim against the receiver and Protective in an action then pending in a Texas federal court, Meyers v. Moody, C.A. Nos. 3-5678-D, 3-7625-D (N.D. Tex.). After that district court refused to allow the counterclaim to be filed, petitioner requested the Circuit Court's permission to file the same claim as an original action. Citing the federal court's ruling on the counterclaim, the Circuit Court denied permission to file the original action. Thus the federal court had been given and had exercised the opportunity to decline to entertain the federal action, and the state court merely followed suit.

Thereafter the receivership proceeded apace. Protective has absorbed all the assets of Empire and all its life insurance policies in force.[10] Moratoriums on cash surrender value of Empire policies, imposed in 1974 as part of Protective's assumption of the policies and receipt of Empire's assets, had been reduced from $14 million to $1.7 million by the end of 1981 and will have been eliminated altogether by the end of 1982. The eggs have been scrambled, and no lawsuit petitioner could conceive would unscramble them.

There remain, however, petitioner's claims for damages for loss of civil and property rights in violation of the Constitution, federal statutes and the common law. *See* App. C pp. C10, C11. Accordingly, and mindful of the Alabama Supreme Court's expansive construction of *Donovan's* exception for *in rem* actions, petitioner once again sought the circuit court's permission to file a federal civil action.

The proposed complaint stated federal causes of action under the Constitution and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985; the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and the Racketering In Corrupt Organizations Act, 18 U.S.C. § 1964(c); and a state law conspiracy claim. It sought only money damages, against nine individual defendants, one corporate defendant, and the State of Texas pursuant to express legislative waiver of sovereign immunity. It did not pray for any relief that would affect the ongoing receivership proceedings or any assets in the possession of the receiver or the court, and named neither

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[10]There is therefore no *res* in the state court's possession which any civil action could affect. Indeed, the only activity in the receivership proceeding in the last few years has been the Receiver's applications for fees and petitioner's efforts to obtain permission to institute litigation. Despite several invitations below, respondents receiver and Protective were unable to specify a single remaining activity of the receivership which petitioner's proposed action could obstruct or affect. Moody v. Barber, No. 81-502 (S.Ct. Ala.), Pet. for Mandamus (March 18, 1982) at 12; Pet.'s Br. in Reply to Respondents' Answers and Brief in Opposition to Petition for Mandamus (April 20, 1982) at 8.

the current receiver nor the receivership court as defendants. In short, it was the type of purely *in personam* federal litigation which this Court held in *Donovan* to be immune from state court interference. Indeed, it raised some claims cognizable only in the federal courts. Petitioner urged that to deny him permission to file this complaint would violate *Donovan* and deprive him of his constitutional rights.

The circuit court nevertheless denied permission to file the complaint. App. B. It did not address the *Donovan* issue at all. Instead it declared that *it* had "previously and finally adjudicated" the claims made in the proposed complaint (even though some of those claims, *e.g.*, under the federal antitrust and anti-racketeering statutes, can only be brought in federal court), thus usurping the federal court's function and duty to decide issues of its own jurisdiction. App. B p. B2 (¶ 3, 4). It harped on petitioner's persistent efforts to obtain judicial relief, in Alabama or anywhere, for deprivation of his civil and property rights, calling this "harassing and vexatious litigation". *Id.* (¶ 8).

Petitioner asked the Alabama Supreme Court for a writ of mandamus (the only avenue for review). Again he urged that the injunction as applied to his proposed lawsuit violated *Donovan* and the Constitution. Without oral argument, in a one-and-a-half page opinion containing neither analysis nor citation (and like the Circuit Court, quite ignoring the *Donovan* rule), the Alabama Supreme Court denied the petition:

> From our review of Moody's complaint, and the evidence submitted by him in support of his mandamus petition, and the answer of Judge Barber, we conclude that the proposed civil action for damages is inextricably connected with the Empire receivership. To permit the suit would be an interference with the receivership and therefore mandamus is denied.

App. A p. A2. The decision thus holds that no more than the existence of a common ground of subject matter between the federal litigation and the state proceedings is enough to justify an injunction against prosecution of a federal *in personam* civil action for damages.

REASONS FOR GRANTING THE WRIT

1. Alabama has Ruled in this Case that Federal Litigation may be Enjoined if it is "Connected With" and hence might "Interfere" With a State Receivership Proceeding, Even Though the Federal Lawsuit is *In Personam* and Cannot Affect Property within the Possession or Control of the State Court. The Alabama Rule Conflicts Squarely with the Rule of Decision this Court Announced in *Donovan v. City of Dallas.*

If allowed to stand as precedent, the decision below will carve a new exception to the general rule that state courts may not enjoin federal litigation or disable citizens of the United States from vindicating their rights and pursuing their claims in the courts of the United States that Article III of the Constitution established for all the people. *Donovan v. City of Dallas,* 377 U.S. 408 (1964); *General Atomic Co. v. Felter,* 434 U.S. 12 (1977); *General Atomic Co. v. Felter,* 436 U.S. 493 (1978).

Donovan is a watershed decision. It distilled the holdings of a long line of earlier cases, and has been relied on since as the landmark authority for restraints on state prohibitions against federal civil litigation. *Donovan* holds that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," 377 U.S. at 413,[11] with a single, narrow

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[11]The petitioners in *Donovan* were seeking to relitigate in federal court the same issues that some of them had already litigated, and lost, in the state courts. Thus even *res judicata* was not enough to bar them from the federal court or to prevent the federal court from determining the *res judicata* issue for itself. As *General Atomic* characterized it:

> . . . *Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings. It involved a suit filed in federal court after the issuance of a final state-court judgment deciding the principal claims pressed in the federal action adversely to the federal plaintiffs. Moreover, . . . the pendency of the federal action had the effect of rendering the state court judgment ineffective,

exception: a state court that has acquired custody over property may enjoin federal litigation that would require the federal court's officers (e.g., the United States Marshals) to take physical custody and control of the same property, *id.* at 412. In this, *Donovan* followed and cited *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 466 (1939):

> . . . it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the *two suits* are in rem, or quasi in rem, so that the court, *or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause* and grant the relief sought the jurisdiction of the one court must yield to that of the other.[12] (emphasis added; footnote omitted).

This Court applied and extended *Donovan* in *General Atomic Co. v. Felter,* 434 U.S. 12 (1977), holding that the *in rem* exception was properly invoked only to prevent an unseemly tug-of-war between two courts seeking to assert physical control over the same *res.*[13] This Court held unequivocally:

> because Texas law provided that the bonds could not be issued while litigation challenging their validity was pending. *We nevertheless overturned the state-court injunction.*

434 U.S. at 17 (emphasis added).

[12] *Accord,* United States *ex rel.* Riggs v. Johnson Cty., 73 U.S. (6 Wall.) 166, 195 (1868) ("state courts are . . . destitute of all power to restrain either the process or proceedings in the National courts").

[13] *See* Markham v. Allen, 326 U.S. 490, 494 (1946); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861). The courts have consistently noted that the *in rem* exception is the sole exception to the *Donovan/Princess Lida* principles and, indeed, that the exception should be narrowly construed. Until now, the states have been powerless to preclude *in personam* federal litigation. *See, e.g.,* Markham v.

> We reverse because under *Donovan v. City of Dallas* it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts.

General Atomic Co. v. Felter, 434 U.S. at 12 (citations omitted). This Court rejected the notion, which the courts below relied on here, App. B p. B2 (¶ 8), that injunctions may issue to forestall "vexatious and harassing litigation." *General Atomic*, 434 U.S. at 16. The Court rejected arguments that state court injunctions may prevent federal courts from exercising concurrent subject matter jurisdiction, or may prevent federal courts from adjudicating legal issues also involved in state proceedings. *Id.* This Court's instructions to all state courts were unambiguous: "The right to pursue federal remedies . . . may no more be restricted by a state court here than in *Donovan*. The Federal courts are fully capable of preventing their [own] misuse for purposes of harassment." *Id.* 18-19. Following this Court's mandate, the district court in *General Atomic* rewrote the injunction to permit "all *in personam* actions in Federal Courts . . . ." *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).[14]

In this case Alabama has effectively overruled *Donovan* and *General Atomic*, without so much as troubling itself to cite,

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Allen, 326 U.S. at 494; Fisher v. American United Life Insurance Co., 314 U.S. 549 (1942); Pufahl v. Park's Estate, 299 U.S. 217, 226 (1936); Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613, 618-190 (1936); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909). State court injunctions and state statutes that prohibit federal litigation have uniformly failed. *See, e.g.*, Monogram Industries, Inc. v. Zellen, 467 F.Supp. 122, 123 (D. Mass. 1979); Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. 448, 451 (W.D. Va. 1975); Slotkin v. Brookdale Hospital Center, 357 F.Supp. 705, 707-08 (S.D.N.Y. 1972); Weisfeld v. Spartans Industries, Inc. 58 F.R.D. 570, 577 (S.D.N.Y. 1972).

[14]Even so, the lower court read the Supreme Court's *General Atomic* decision too narrowly. In a subsequent *General Atomic* case, the Court issued a writ of mandamus to prevent the lower court from extending its injunction to forbid arbitration proceedings under Federal law. General Atomic Co. v. Felter, 436 U.S. 493 (1978).

much less distinguish this Court's holdings. Make no mistake; Alabama's claim to enjoin Federal litigation that is merely "connected with" a state proceeding and which therefore might cause some unspecified "interference" with a state proceeding establishes a new rule. If *Donovan* and *General Atomic* are to be overruled, it should be this Court, not Alabama, that should do so; for "[i]t is emphatically the province and duty of the [federal] judicial department to say what the law is,"[15] and once so declared "the Judges in every state shall be bound thereby . . . ."[16]

2. The Alabama Rule Conflicts with Lower Federal Court Decisions that Uniformly have Followed *Donovan v. City of Dallas.*

The decision below portends a state court rush away from the *Donovan* rule which the federal courts so far have declined to join. It conflicts with decisions of the Seventh Circuit and district courts in the Second and Fourth Circuits which hew faithfully to the letter and spirit of *Donovan.*

The Decision of the Seventh Circuit

In *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979), a Missouri state court had placed an insurance company in receivership and, as here, issued an injunction restraining all persons "from prosecuting or bringing any action, . . . against the [insurance company] . . . or its properties or assets, except pursuant to the order of this court." Plaintiffs then filed an amended complaint in a pending federal action against the insurance company, alleging (pursuant to the Employee Retirement Income Security Act of 1974) that the insurance company had participated in a conspiracy to defraud the pension fund of its asssets. The district court refused to

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[15]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See* Cooper v. Aaron, 358 U.S. 1 (1958). *See also* U.S. Constitution, Art III, § 1.

[16]U.S. Constitution, Art. VI.

dismiss the case on the basis of the injunction and the insurance company appealed.

The Seventh Circuit expressly refused to extend the *Donovan in rem* exception even to federal actions which "although technically in personam . . . [have] substantial *in rem* aspects." 600 F.2d at 675 n. 7. The Seventh Circuit considered *Donovan* to mean precisely what this Court's opinion said: state courts are barred from interfering with any federal *in personam* litigation, regardless of its subject matter or merits.

> If this federal action were in rem, it would present a very different situation. *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976) involved state and federal proceedings, both in rem . . . .[17]
>
> [T]he Fund's second amended complaint seeks to enforce a personal liability and obtain a money judgment, not to obtain possession of a res. Old Security describes injunction motions by the Fund as demanding in rem relief. Nothing of record indicates that the district court granted these motions or any in rem relief. The district court is fully capable of preventing inappropriate conversion of the suit to a proceeding truly in rem.

Id.

Here, in contrast, the Alabama Supreme Court did not even search for "substantial *in rem* aspects" in petitioner's proposed

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[17]The Seventh Circuit noted, quoting the district court, that *Blackhawk Heating & Plumbing* was a situation where

> the Federal court should not simultaneously proceed with liquidation of the *res*, particularly when a domestic insurance company is involved. *However, when the Federal suit is proceeding in personam, we see no reason why we should not proceed simultaneously with the State court liquidation proceedings.*

600 F.2d at 674 (emphasis added). District courts in the Seventh Circuit of course follow *Central States. See, e.g.*, Tcherepnin v. Franz, 475 F.Supp. 92, 95-96 (N.D. Ill. 1979).

lawsuit. Here it was enough for the subject matter to be "connected" and hence to pose a fancied threat of unspecified "interference" with the receivership.

The Decision of the District Court In The Second Circuit

In *Slotkin v. Brookdale Hospital Center*, 357 F.Supp. 705 (S.D.N.Y. 1972), a New York state court had enjoined all actions against an insurance company in liquidation. (The New York statute is virtually identical to Alabama's). Plaintiffs filed a federal diversity action based on fraud committed by the company and its former employees. The district court denied the liquidator's motion to dismiss the case because of the injunction.

> This injunction would require our dismissal of the instant proceeding only if the state court requires exclusive jurisdiction to protect the *res* — the corporate assets. Thus, if two suits are *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other in order "to avoid unseemly and disastrous conflicts in the administration of our dual judicial system . . . ." *But two actions may proceed simultaneously where one is in rem and the other is in personam.*

357 F.Supp. at 707 (citation omitted; emphasis added).

The federal action in *Slotkin* was as much "inextricably connected with", as much an "interference" with the state proceedings as is petitioner's proposed federal complaint. It did not even present claims for relief that may be heard only in federal court, like some of petitioner's proposed claims. But where the *Slotkin* court followed *Donovan*, the Alabama Supreme Court ignored it.

The Decision of the District Court In The Fourth Circuit

In *Mills v. Roanoke Ind. Loan & Thrift*, 70 F.R.D. 448 (W.D. Va. 1975), a Virginia state court had issued an injunction

restraining "all persons from prosecuting suits" against a company in state receivership "without first obtaining permission of the court." Plaintiffs filed suit in federal court against former employees of the company, the company itself and the receivers for violation of federal securities law. Defendants asked the court to dismiss the case or to abstain on the basis of the injunction. Noting that some of plaintiff's claims were within the exclusive jurisdiction of the federal courts, *id.* at 451, the district court denied the motion.

> . . . where one suit is *in rem*, as is the receivership proceeding in state court, and the other suit is *in personam*, it is equally well established that each court may exercise its concurrent jurisdiction independently of the other . . . . Under such circumstances, *the state court could not enjoin plaintiffs from asserting their federal causes of action.*

Id. (citations omitted; emphasis added). The court's decision could not have conflicted more squarely with the Alabama Supreme Court's: "Plaintiff's suit is *in personam*, and as noted above there is no limitation which would prohibit plaintiffs from proceeding in [the federal] forum." *Id.*[18]

3. Thirty-three States Have Anti-litigation Statutes Like Alabama's. If the Alabama Rule is Allowed to Stand as Precedent, it Threatens Broad new State-imposed Restrictions on Federal Litigation.

The national importance of the issue raised here should not be underestimated. As we have seen, similar anti-lawsuit injunctions issued in insurance company cases have been brought to federal courts from states as widespread as Missouri, New York

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[18]To the extent that *Central States, Slotkin* and *Mills* strictly follow *Donovan* and refuse to apply a state anti-lawsuit injunction to any but an *in rem* action, they also conflict with *Sumrall*. There, as we have noted, p. 6 *supra*, the Fifth Circuit considered the *Donovan* exception to include an action seeking not *in rem* but other specific injunctive relief – albeit relief that in its view would have deprived the state court receiver of "possession" of the res. 632 F.2d at 1352.

and Alabama. As we have noted, 33 states have statutes expressly proving for such injunctions in insurance receivership or liquidation cases. The National Association of Insurance Commissioners has recommended that such an injunction be issued in *every* such case, NAIC, *Model Insurance Laws, Regulations and Guidelines*, Art. I, § 5(A)(6), and its manual provides sample language that sweeps broadly, *see* App. E, pp. E3-E4. Experience in just one state, Texas, indicates that such injunctions are now routine. *See* App. E, pp. E1-E2.

Petitioner's experience (pp. 5-6 *supra*) demonstrates that even where such injunctions are so obviously overbroad as to violate the *Donovan* rule, citizens challenge them at their peril. A proliferation of statutes, the lobbying of insurance commissioners (themselves often receivers) and courts' routine issuance of injunctions at their behest promote a silent, growing encroachment on federal courts' jurisdiction (*see* 4 *infra*) and citizens' liberty (*see* 5 *infra*), making the *Donovan* rule a dead letter. Other states are sure to follow Alabama's rewrite of *Donovan* to expand its narrow allowance only of state injunctions against *in rem* suits that would disturb state court possession of property. Other states will feel free to enjoin citizens from pursuing in the federal courts their right to damages under federal statutes in cases "connected" with insurance insolvencies, liquidations or receiverships, labeling such suits "interference." They will do so, that is, unless this Court grants certiorari to review and call a halt to such practices now.

4. The Alabama Rule Impinges on the Article III Powers of Federal Courts and Deprives the Federal Courts of Jurisdiction to Determine their own Jurisdiction.

Alabama's rule threatens the independence of the federal courts. *Donovan's* prohibition of state court injunctions against federal *in personam* litigation is an "old and well-established judicially declared rule," 377 U.S. at 412-13.[19] It is based on the principle, grounded in Articles III and VI of the Constitution,

[19] *See* cases cited at *id.* 413 n.11. *See also* cases cited at n.13 *supra*.

that states are without power to curtail the jurisdiction of the federal judiciary. This Court has enforced that principle for over a hundred years, and thus states may not restrict federal courts from enforcing rights arising under state statutes,[20] or condition the right of corporations to do business within a state upon waiver of the right to sue in federal court.[21]

It is unquestionable that federal courts have exclusive authority to determine their own jurisdiction.[22] State action which has "the effect to take [the authority] away" cannot stand.[23] This Court has always viewed "the exemption of the authority from interference by legislative or judicial action of the states [as] essential to [the federal courts'] independence and efficiency."[24]

If the Alabama rule stands, the federal district court is deprived of power to "decide whether [petitioner's] case is properly before it,"[25] and, if necessary, itself to prevent "prosecution of vexatious federal proceedings."[26] For under the Alabama rule, no federal case may commence at all.

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[20]Chicago and N.W. Ry. Co. v. Whitton, 80 U.S. (13 Wall.) 86 (1871).

[21]Home Ins. Co. v. Morse, 87 U.S. 445 (1874).

[22]*See, e.g.*, United States v. United Mine Workers of America, 330 U.S. 258, 292-93 (1947); Chicago and N.W. Ry. Co. v. Whitton, 80 U.S. (13 Wall.) at 290-92; Payne v. Hook, 74 U.S. (7 Wall.) 425 (1869).

[23]*See* United States v. City of Keokuk, Iowa, 73 U.S. (6 Wall.) 518 (1868).

[24]Central Nat'l Bank v. Stevens, 169 U.S. 432, 439 (1893) (citations omitted). *Accord*, United States *ex rel.* Riggs v. Johnson Cty., 73 U.S. (6 Wall.) 166, 194 (1868).

[25]United States v. Shipp, 203 U.S. 563, 573 (1906), *quoted in* United States v. United Mine Workers of America, 330 U.S. 258, 291 (1947). *Compare* App. B ¶¶ 3, 4).

[26]General Atomic Co. v. Felter, 434 U.S. at 17. *Compare* App. B (¶ 8).

5. The Alabama Rule Unconstitutionally Abridges Petitioner's First Amendment Right to Petition the Courts for Redress of Grievances.

In simple terms, the Alabama Supreme Court's decision abridges petitioner's right to petition the federal courts for redress of his grievances.[27] The constitutional right of access to the courts is "among the most precious liberties safeguarded by the Bill of Rights,"[28] a right itself "subject to the due process protection of the Fifth Amendment,"[29] a right not merely abstract, but to be exercised at a "meaningful time and in a meaningful manner."[30] The states may not "unjustifiably obstruct . . . the right of access,"[31] even by indirect means.[32]

Absent here is the balancing consideration of protecting a state court's control and possession of property obtained pursuant to lawful process, the consideration recognized in *Donovan*. Alabama has violated and must bow to petitioner's First Amendment rights.

Alabama's action here is particularly invidious. It deprived petitioner of his sole means to vindicate rights conferred by federal statute.[33] The proposed complaint set forth claims under the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 *et*

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[27]California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

[28]United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). *See also* Johnson v. Avery, 393 U.S. 483, 485 (1969); Ex Parte Hull, 312 U.S. 546, 549 (1941).

[29]In re N.C. Trading, 586 F.2d 221, 231 n.28 (Ct. Cust. and Pat. App. 1978).

[30]Armstrong v. Manzo, 380 U.S. 545, 552 (1965). *Accord*, Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

[31]Procunier v. Martinez, 416 U.S. 396, 419 (1974).

[32]Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7 (1964). *See* United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. at 222; Boddie v. Connecticut, 401 U.S. at 379-83.

[33]As well as preventing him from pursuing federal constitutional rights under the civil rights acts, App. C pp. C10-11, cognizable in both state and federal courts. Martinez v. California, 444 U.S. 277 (1980). *See* Allen v. McCurry, 449 U.S. 90 (1980); Maine v. Thiboutet, 448 U.S. 1, 11 (1980); Monroe v. Pape, 365 U.S. 167, 183 (1961).

seq., and the Sherman Act, 15 U.S.C. § 4. The federal courts have exclusive jurisdiction of these claims.[34] Alabama has prevented petitioner from asserting these federal rights at all,[35] has denied him a "reasonable opportunity" to resort to the courts,[36] has barred him from "the only forum effectively empowered to settle their disputes."[37] As this court holds, "[t]he right to petition the courts cannot be so handicapped."[38]

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[34]18 U.S.C. § 1964; 15 U.S.C. § 4; Freeman v. Bee Machine Co., 319 U.S. 448, 451 n.6 (1943); General Investment Co. v. Lake Shore & Michigan Southern Rye Co., 260 U.S. 261, 287 (1922); Hand v. Kansas City Southern Rye Co., 55 F.2d 712 (S.D.N.Y. 1931); Vaughn & Co., Ltd. v. Saul, 237 S.E.2d 622 (1977). *See also* Wilder Manufacturing Co. v. Corn Products Co., 236 U.S. 165, 174-75 (1915), *quoting* Farmers' & M. Nat. Bank v. Dearing, 91 U.S. 29, 35 (1875).

[35]*See* Hupfeld v. Automation Piano Co., 55 F.2d 788 (C.C.S.D.N.Y. 1895), *reaff'd in* Merrill, Lynch, Fenner & Smith v. Cavichia, 311 F.Supp. 149 (S.D.N.Y. 1970). *Compare* Fischer v. New York Stock Exchange, 408 F.Supp. 745, 750 n.4 (S.D.N.Y. 1976) (". . . requirement of prior leave to sue a receiver does not apply where . . . the subject of the suit is one over which the federal court has exclusive jurisdiction").

[36]Procunier v. Martinez, 416 U.S. at 419.

[37]Boddie v. Connecticut, 401 U.S. at 376.

[38]Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. at 7. And *see* Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. at 451, in which the federal district court faced the identical situation and declined to apply a similar injunction to exclusively federal causes of action under the Securities Act of 1934;

> There is no question as to plaintiffs' substantial federal rights to seek such relief in this court. As to the alleged violations of the 1933 Act, this court has concurrent jurisdiction with the state courts, 15 U.S.C. § 77v, and *the alleged violations of the 1934 Act are within the exclusive jurisdiction of this court,* 15 U.S.C. § 78aa. Plaintiff's suit is *in personam,* and as noted above there is no limitation which would prohibit plaintiffs from proceeding in this forum.

(emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Received: Aug 2]

JUL 30 1982

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1982

Ex parte: Shearn Moody, Jr.

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama, ex rel.,
Tharpe Forrester, Commissioner
of Insurance

81-502

v.

Empire Life Insurance Company
of America, an Alabama Corporation)

FAULKNER, JUSTICE.

Moody petitions this Court to issue a writ of mandamus to Circuit Judge William C. Barber of the 10th Judicial Circuit, to permit him to institute what he designates as a purely in personam action in a United States District Court in Texas. Moody is subject to an injunction against his filing certain law suits that Judge Barber issued on January 6, 1975, in *State ex rel. Forrester v. Empire Life Insurance Company,* CA # 171-687, Circuit Court of Jefferson County.

The proposed complaint attached to Moody's mandamus petition seeks damages against the State of Texas; Protective Life Insurance Company; John Bookout, a former Alabama Insurance Commissioner; William Baxley, a former Attorney General of Alabama; and a host of Texas defendants. Moody claims in the complaint that the defendants have deprived him of the value of his majority interest in Empire Life, now in receivership. Moody alleges that his proposed action for damages will in no way interfere with, delay or stop the Empire Life receivership proceedings.

Judge Barber answers the petition for mandamus by saying that Moody has failed to offer any evidence that the proposed action in the United States District Court did not involve the Empire Life receivership proceedings.

From our review of Moody's complaint, and the evidence submitted by him in support of his mandamus petition, and the answer of Judge Barber, we conclude that the proposed civil action for damages is inextricably connected with the Empire receivership. To permit the suit would be an interference with the receivership and therefore mandamus is denied.

WRIT DENIED.

Torbet, C. J., Almon, Embry and Adams, JJ., concur.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 30th day of July, 1982

/s/ Dorothy F. Norwood
Acting Clerk, Supreme Court of Alabama

APPENDIX B

[Received: Feb 25]

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
EQUITY DIVISION

STATE OF ALABAMA, EX REL. THARPE FORRESTER, COMMISSIONER OF INSURANCE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 171-687
EMPIRE LIFE INSURANCE COMPANY OF AMERICA, an Alabama corporation, Defendant,	)	
and	)	
SHEARN MOODY, JR., Intervenor.	)	

ORDER AND DECREE

This cause is before the Court on the motion of Intervenor, Shearn Moody, Jr., for an order permitting him to institute more litigation. After due consideration of the matters of record in this receivership proceeding, the subject motion by Intervenor Moody, the amendments thereto, documentary exhibits received at the hearings before this Court on November 24, 1981 and January 28, 1982, briefs and oral argument of attorneys for Moody, Protective Life Insurance Company, and Tharpe Forrester, the current receiver, the Court is of the opinion that the relief sought by the Motion for Order Permitting Shearn Moody, Jr. to Institute Litigation, as amended, should be denied for the following reasons:

1. The proposed complaint that Moody seeks to file is substantially similar to the amended complaint that Moody caused to be filed in *Willie Allmon v. John G. Bookout et al.*, C.A. No. 74-377-N (M.D. Ala. 1975). This was admitted by counsel for Moody in open court on January 28, 1982.

2. The subject proposed complaint is also substantially similar to the proposed complaint that this Court denied permission to Moody to file on November 29, 1976. Moody's counsel has also admitted this.

3. Contrary to the allegations by Moody set forth in the proposed complaint that he now seeks to file, this Court has previously and finally adjudicated that Moody's claims of conspiracy and wrongful actions by Protective and the original receiver have no merit.

4. Contrary to the allegations of Moody's proposed complaint, this Court has previously and finally adjudicated all issues relating to the valuation of the trust asset in this Court's holding that Empire was impaired and insolvent.

5. Moody declined to submit voluntarily to deposition, and declined to provide other discovery in connection with the proposed complaint. At the two evidentiary hearings on the pending motion, Moody offered no testimony or other evidence tending to show that the proposed litigation did not involve the Empire receivership proceedings or was not another effort by Moody to interfere with, delay, or stop the Empire receivership proceedings.

6. The Court believes and finds that the proposed litigation sought by Moody involves the Empire receivership proceeding and would interfere with, delay, and seek to stop these proceedings.

7. Moody has failed to carry the burden of proving that the relief sought by the pending motion should be granted or that he is entitled to any relief.

8. Moody has pursued a pattern of harassing and vexatious litigation, inextricably involved with the Empire receivership proceedings, against the receiver, Protective, and others.

9. Moody was adjuged in criminal contempt on November 1, 1976. On Moody's petition for certiorari, the Supreme Court of Alabama affirmed penalties against Moody by reason of his criminal contempt. Moody has not satisfied the contempt fines; he has not surrendered himself to the Sheriff of Jefferson Coun-

ty, Alabama to serve the sentences imposed, as modified and affirmed by the Supreme Court of Alabama.

ACCORDINGLY, it is ORDERED, ADJUDGED, AND DECREED as follows:

ONE: Moody's motion for an order permitting him to institute litigation, as said motion has been amended by Moody from time to time, is hereby DENIED AND OVERRULED.

TWO: Moody's motion to quash the discovery sought by Protective and the notice of deposition filed by the receiver is DENIED AND OVERRULED.

THREE: Moody's alternative motion for a protective order providing that no discovery be had is deemed MOOT.

FOUR: Protective's motion to compel Moody to provide discovery is also deemed by the Court to be MOOT. In view of the Court's findings and ruling on the subject motion by Moody, the Court considers that the discovery sought by Protective and opposed by Moody is not essential though it may have shed additional light on the issues presented.

FIVE: Costs of the pending motion are hereby taxed against Intervenor, Shearn Moody, Jr.

DONE, this 5th day of February, 1982.

/s/ Wm. C. Barber
Circuit Judge in Equity

cc: Mr. William A. Dobrovir
Mr. William H. Mills
Mr. William A. Robinson
Mr. James W. Webb

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE _____DISTRICT OF _____

SHEARN MOODY, Plaintiff,	)	
v.	)	No.
STATE OF TEXAS, PROTECTIVE LIFE INSURANCE CO. JOHN G. BOOKOUT, WILLIAM J. BAXLEY, MARGARET M. MARTIN, ALFRED WALKER, RALPH R. RASH, CLAY COTTEN, HERBERT CROOK, A. GENE SYKES, and PAUL T. CARR. Defendants.	)	

COMPLAINT FOR DAMAGES

1. This is an action for damages plaintiff suffered by reason of a conspiracy by public officials in the states of Texas, Alabama, and Arkansas, acting under color of their office and of state law, to deprive plaintiff of his property in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The property was plaintiff's ownership interest in a major insurance company that did business in interstate commerce. As a result of the conspiracy, plaintiff's company was driven out of business and plaintiff was deprived of his interest in the company and other valuable property.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331(a), 1337, 1343(a), 18 U.S.C. § 1964, 15 U.S.C. § 15, and the pendent jurisdiction of this Court. Venue lies in this District under 28 U.S.C. § 1391(b).

PARTIES

Plaintiff

3. Plaintiff Shearn R. Moody, Jr. ("Moody") is a resident of Galveston, Texas. From 1963 to 1972, Moody was President, Chairman of the Board, and majority shareholder of the Empire Life Insurance Company of America ("Empire"). Empire was a corporation organized under the laws of the State of Alabama, maintained executive offices in Dallas, Texas, and did business in several states, including Texas, Alabama and Arkansas.

Defendants

4. (a) Defendant State of Texas ("Texas") has authorized this suit by House Concurrent Resolution Number 118 (May 27, 1975), adopted by the Texas State Senate (May 29, 1975) and approved by the Governor of the State (June 19, 1975). (Exhibit A).

(b) Defendant Protective Life Insurance ("Protective") is a corporation organized under the laws of the State of Alabama, maintains executive offices in Jefferson County, Alabama, and transacts business in several states, including Texas and Alabama. In 1974, Protective acquired all assets of Empire.

(c) Defendant John G. Bookout ("Bookout") is a resident of Montgomery County, Alabama. From January 1971 until January 1975, Bookout was Superintendent (later Commissioner) of Insurance of the State of Alabama. On June 29, 1972, Bookout was named receiver of Empire.

(d) Defendant William J. Baxley ("Baxley") is a resident of Jefferson County, Alabama. From January 1971 until January 1978, Baxley was Attorney General of the State of Alabama.

(e) Defendant Margaret M. Martin is the executrix of the estate of Crawford C. Martin ("Martin") and is a resident of Hill County, Texas. From January 1967 until December 1972, Martin was Attorney General of the State of Texas.

(f) Defendant Alfred Walker ("Walker") is a resident of

Travis County, Texas. From February 1970 until January 1973, Walker was Executive Assistant to Martin, in his capacity as Attorney General of the State of Texas.

(g) Defendant Ralph R. Rash ("Rash") is a resident of Travis County, Texas. From November 1964 until May 1974, Rash was an Assistant Attorney General of the State of Texas and from 1971 until May 1974 was Chief of the Insurance, Banking, and Securities Division of the Texas Attorney General's Office.

(h) Defendant Clay Cotten ("Cotten") is a resident of Travis County, Texas. From November 1965 until January 1974, Cotten was Insurance Commissioner of the State of Texas.

(i) Defendant Herbert Crook ("Crook") is a resident of Travis County, Texas. From 1967 until February 1974, Crook was attorney for the Liquidator of the Texas State Board of Insurance. On February 1, 1974, Crook was appointed Liquidator of the Texas State Board of Insurance. As such, he became the Texas ancillary receiver of Empire until August, 1978.

(j) Defendant A. Gene Sykes ("Sykes") is a resident of Pulaski County, Arkansas. From 1970 until October 1972, Sykes was Insurance Commissioner for the State of Arkansas.

(k) Defendant Paul T. Carr ("Carr") is a resident of Jefferson County, Alabama. Carr is an insurance consultant.

FACTS

(5) On June 27, 1963, Moody formed Empire and caused it to be incorporated. On July 9, 1963, Empire was licensed to sell life insurance in the State of Alabama. Moody was the Chairman of the Board and principal stockholder of Empire.

6. In July 1963, for the purpose of providing Empire with working capital, Moody transferred to Empire, in exchange for a $200,000 surplus debenture, a two-fifths share of Moody's (one-eighth) life interest in the Libby Shearn Moody Trust (the "trust asset").

7. In 1964, the Alabama Superintendent of Insurance assess-

ed the value of the trust asset at $5,813,440, based on an accounting formula developed and applied by the accounting firm of Ernst and Ernst, and subject to insurance on Moody's life in the amount of $6 million.

8. In 1965, Empire's management submitted to the Alabama Superintendent of Insurance updated figures on the earnings and value of the Libby Shearn Moody Trust. On December 13, 1965, the Insurance Departments of Alabama, Texas, and Arkansas approved a report that revalued the trust asset to $14,213,440, subject to an increase in collateral, to wit an increase in the face amount of the life insurance policy on Moody's life, first to $10,000,000, later $14,000,000 and assignment by Moody to a trustee of legal and equitable ownership of Empire stock, $3,528,000 in value. Moody and Empire complied with the new collateral requirements.

9. In 1965 Empire began a program of acquisitions of and mergers and reinsurance treaties with other insurance companies throughout the United States. As of December 31, 1965, as a result of this program Empire and its subsidiaries were transacting business in eighteen states.

10. In the states in which Empire acquired insurance business, the insurance superintendents and commissioners approved the mergers based upon a $14,213,440 trust asset valuation.

11. In June 1969 the Alabama Insurance Commissioner again approved the $14,213,440 valuation, but required Empire to begin reducing that valuation each year to account for Moody's annual reduction in life expectancy, and accordingly to place $430,710 annually in a special surplus reserve fund. The Commissioner also approved the $14,213,440 valuation of the trust asset for future years through 1972 and beyond, with the condition that the special surplus reserve be maintained.

12. From 1954 to 1973 and 1977 to the present, Moody has been trustee of the Moody Foundation, one of the largest charitable institutions in the State of Texas.

13. In October 1970 Martin, acting as Attorney General of

Texas, became a party to a lawsuit between Moody and other trustees of the Moody Foundation, including Paul Haas.

14. In the spring of 1970 Haas made campaign contributions to Martin. In January 1971 Haas had offered use of his private two engine airplane to Martin to transport Martin to a hearing in the Moody-Haas litigation.

15. In October 1971 Martin made public statements, reported prominently in the press, calling for Moody's removal as a trustee of the Moody Foundation. In the lawsuit, in December 1971, Martin sought as relief the removal of Moody as a trustee of the Moody Foundation.

16. In December 1971 the Texas court ruled in favor of Moody in the litigation.

17. Martin, seeking reelection in 1972 as Attorney General of Texas, was opposed for the Democratic nomination by John Hill. Martin became aware early in 1972 that Moody was supporting Hill's campaign. Martin charged in public and to the press that he considered Moody to be his real opponent in the election contest. Martin determined to seek revenge against Moody for his political support of Hill and, motivated by his desire to punish Moody for Moody's political opposition to him, Martin took the actions described in ¶¶ 22-26 below.

18. In January 1971 Bookout was appointed Alabama Insurance Commissioner. Despite the predecessor Commissioner's June 9, 1969, prospective valuations of the trust asset through 1972 and thereafter, Bookout almost immediately after assuming office took steps to devalue the trust asset.

19. On October 14, 1971, before any formal administrative proceedings against Empire concerning the valuation of any of Empire's assets, including the trust asset, were even attempted, Bookout accused Moody of mismanagement and threatened him with a receivership and the liquidation of Empire.

20. In late 1971, Bookout met and spoke with Cotten and Sykes. Together they formed the intention to deprive Moody of his ownership and control of Empire. Without having received any evidence or having conducted any proceedings on

the merits, Bookout, Cotten and Sykes determined to devalue the Empire trust asset and deprive Moody of control of Empire. Pursuant to the plan jointly formed in his meeting and conversations with Cotten and Sykes, Bookout withdrew a previous request to the National Association of Insurance Commissions for guidance concerning valuation of the trust asset. On January 20, 1972, Bookout notified Empire that he intended to devalue the trust asset and that he considered Empire to be significantly "impaired."

21. In late 1971 and early 1972, in anticipation of placing Empire into receivership, Bookout met with Carr, an insurance consultant, and communicated with Judge Barber.

22. At or about the same time that Bookout met with Cotten and Sykes, Martin contacted Baxley, then Alabama Attorney General. Martin declared to Baxley that Empire was being mismanaged or was financially impaired, and that Empire's management included "people with unsavory reputations." During the next several months, Martin, Walker (Martin's assistant), and Rash continued to urge Baxley to take steps against Moody and his company. In early 1972, without any independent knowledge or evidence of any impropriety by Moody or of financial impairment of Empire and without any basis in fact or in law to take action against Moody or Empire, Baxley agreed to acquiesce to Martin's importunings and to take such action as Martin desired.

23. In early 1972, Martin instructed Walker to prepare for Baxley a letter to be addressed by Baxley to Bookout, urging Bookout to place Empire into receivership. This letter was mailed to Baxley.

24. On April 3, 1972, Baxley sent a letter based on the Martin/Walker draft to Bookout. At the time, Baxley still had no independent knowledge of any alleged impairment of Empire. Martin continued to urge Baxley to cause Bookout to place Empire into receivership and remove Moody from control, and pursuant to his agreement with Martin, Baxley continued to encourage Bookout to commence receivership proceedings.

25. In March 1972 Rash informed Walker that Cotten had in-

formed him that Cotten and Bookout were determined to remove Moody from control of Empire.

26. In an effort to build public pressure for a receivership, Baxley, Martin and Cotten revealed confidential information that put Empire in an unfavorable light and made statements encouraging the placement of Empire into receivership to Alabama and Texas newspapers.

27. On April 5, 1972, Cotten, without conducting any hearing, entered an Order of Supervision placing an Administrator in supervisory control of Empire in the State of Texas, in the place of Empire's Board of Directors.

28. Pursuant to his agreement with Bookout and Cotten, Sykes then sought a receivership over Empire in the State of Arkansas, based on the Texas administrative order. On April 11, 1972, Sykes mailed to Bookout a copy of a petition for receivership and an order placing Empire into receivership in the Arkansas state courts, effective April 10, 1972.

29. Bookout scheduled an administrative hearing, at which he would preside and consider evidence as to whether the trust asset should be devalued, to take place on April 10, 1972. One week before the hearing, Bookout wrote to Baxley requesting authorization to file suit to place Empire into receivership. On April 10, 1972, before the hearing began and at the request of Rash, Baxley hand-delivered to Bookout authorization to place Empire into receivership.

30. On April 13, 1972, two days after Empire had submitted evidence to Bookout demonstrating that the $14 million valuation of the trust asset was conservative, Bookout wrote to Moody that he had fixed the value of the trust asset at $4,250,000. Bookout also falsely informed Moody that Alabama law required him to place Empire into receivership once another state (Arkansas) had done so, when, as Bookout knew or had reason to know, Alabama law explicitly gave him as Commissioner broad discretion in such circumstances.

31. On April 20, 1972, Bookout, acting upon Baxley's authorization given at Rash's instance, instituted receivership

proceedings against Empire by filing a petition in the Circuit Court of Jefferson County, Alabama, to place Empire in permanent receivership. On June 15, 1972, Bookout met with Robert and Shearn Moody in Denver, Colorado, and admitted that his actions had been caused by intense political pressure from the offices of Cotten, Martin, and Baxley which had urged Bookout to force Moody out of the insurance business.

32. Bookout also told Robert and Shearn Moody that he intended to return control of Empire to Moody once the political pressure subsided. Bookout requested Moody to withdraw Empire's request for a rehearing on the valuation of the trust asset. Moody complied with the request.

33. On June 22, 1972, Cotten formally requested Martin to initiate ancillary receivership proceedings against Empire in the State of Texas.

34. On June 29, 1972, the Circuit Court of Jefferson County, Alabama, Hon. William C. Barber presiding, granted Bookout's petition to place Empire in permanent receivership in the State of Alabama and appointed Bookout receiver.

35. Bookout as receiver of Empire was under court order to rehabilitate Empire and return it to the control of its stockholders and directors instead of proceeding to liquidation. Sykes was under a similar order in Arkansas and Texas law imposed the same duty upon Cotten. Bookout, Protective, Carr, Martin, Walker, Rash, Crook, Cotten and Sykes conspired to prevent rehabilitation, for the purpose of liquidating Empire in order to turn its assets over to Protective through a bulk reinsurance treaty.

36. Bookout determined that reinsurance proposals should be solicited and evaluated before making the final decision to rehabilitate or liquidate. On August 29, 1973, a self-selected committee of interested insurance commissioners, of which Bookout and Cotten were members, resolved that reinsurance be considered only by companies with surplus exceeding $25 million. Protective, a competitor of Empire and its subsidiaries in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana,

Maryland, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and the District of Columbia, did not fit within the category.

37. Carr, the receivership's consulting expert on insurance matters, determined that a rehabilitation plan proposed by Moody was feasible and should be adopted. Under the plan, three of Empire's subsidiaries would merge and would reinsure Empire's policies.

38. Cotten, Rash and Sykes were determined not to permit any rehabilitation plan that would enable Moody to regain control of Empire and its assets. In September 1972, Rash told Cotten that he was disturbed that Alabama would consider rehabilitation. In March 1973 Cotten wrote Bookout, strongly opposing any rehabilitation plan. In May 1973, after Bookout submitted rehabilitation proposals to Cotten, Cotten sought to pressure Bookout into rejecting them and made representations, *ex parte,* directly to Judge Barber. In October 1973, Cotten sought various means to prevent Empire from being rehabilitated. In early 1974, Cotten and Rash became alarmed upon learning that Judge Barber was favorably inclined to accept Moody's specific rehabilitation proposal, based on Carr's recommendation.

39. During 1973 Protective contacted Bookout, Carr, and Judge Barber to express its interest in acquiring Empire's assets.

40. In February 1973 Ryburn Bailey, Protective's counsel, met with Carr and offered to bribe him by suggesting that if Protective was to assume Empire's assets and insurance business through the receivership, Protective would engage Carr's services as a consultant.

41. On September 12, 1973, acting on Carr's advice, Judge Barber ordered a $15 million minimum surplus requirement for prospective bidders, instead of the $25 million minimum surplus requirement adopted by the insurance commissioners on August 29, 1973. This made Protective eligible to submit reinsurance proposals.

42. On October 26, 1973, Ryburn Bailey and William Rushton, Protective's President, approached Judge Barber *ex parte* to discuss Protective's contemplated bid.

43. The deadline for submission of reinsurance proposals was November 2, 1973. On November 3, 1973, Judge Barber instructed Carr to study the proposals submitted and to recommend which, if any, should be accepted.

44. On November 6, 1973, Carr met with Thomas Pennington, a Protective Vice President. Three days later, Carr emphatically recommended Protective's bid to Judge Barber, even though he had previously taken the position that Moody's rehabilitation program was appropriate and should be accepted.

45. Protective lobbied insurance commissioners of other states to support its proposal. On December 5, 1973, Protective convinced a committee of interested insurance commissioners to pass a resolution recommending the Protective bid. Cotten, pursuant to the conspiracy to prevent any rehabilitation plan from being adopted, signed the resolution.

46. On January 8, 1974, Bookout petitioned the Circuit Court of Jefferson County, Alabama to liquidate Empire, to accept Protective's proposal to reinsure Empire, and to permit Protective to assume all of Empire's assets, including the trust asset, without any compensation to Empire's shareholders.

47. In April 1974 Crook in his capacity as Texas Liquidator attended a hearing before Judge Barber. He thereafter met with Rash and others to consider what further steps to take to assure that Empire would not be rehabilitated.

48. On June 14, 1974, Judge Barber granted Bookout's petition of January 8, 1974.

CLAIMS FOR RELIEF

49. In their actions to obtain devaluation of the trust asset and placement of Empire into receivership, Martin, Walker, Rash, Cotten, Bookout, Carr, and Sykes, acting under color of their offices and of state law, conspired to and did in fact violate Moody's constitutional right to maintain his political views, to

participate in the electoral process, to maintain an interest in property (i.e. Empire), to due process of law, and to equal protection of the law, in violation of the First, Fifth and Fourteenth Amendments to the Constitution and 42 U.S.C. §§ 1983 and 1985.

50. In their actions to prevent rehabilitation of Empire and give control and possession of Empire's assets to Protective, Martin, Walker, Rash, Cotten, Bookout, Carr, Sykes and Protective, the officials acting under color of their offices and of state law, violated Moody's constitutional rights to maintain an interest in property (i.e. Empire), to equal access to the courts, to due process of law free of improper influence or attempted influence, and to equal protection of the law, in violation of the First, Fifth and Fourteenth Amendments to the Constitution and 42 U.S.C. §§ 1983 and 1985.

51. In their attempts to eliminate Empire and its subsidiaries as actual and potential competitors to Protective in the sale of life insurance in interstate commerce, defendants violated the federal antitrust laws, 15 U.S.C. § 1 *et seq.*

52. In their fraudulent attempts to obtain devaluation of the trust asset, to have Empire placed in receivership, to prevent Empire's rehabilitation and to obtain court approval of Protective's reinsurance proposal through bribery and other unlawful means, defendants used the U.S. Postal System and telephone communications and violated 18 U.S.C. §§ 201, 1341 and 1343 and 15 U.S.C. § 78j (and implementing regulation). Protective thus acquired, and the other defendants helped it to acquire, an interest and control of an enterprise, Empire, engaged in interstate commerce, in violation of 18 U.S.C. §§ 1962, 1964(c). Defendants are liable to Moody for treble damages and cost of this suit, including attorney's fees, under 18 U.S.C. § 1964(c).

53. In conspiring to commit the acts set forth in ¶¶ 1-52, by illegal means and for an improper purpose, Martin, Walker, Rash, Cotten, Bookout, Carr, Sykes and Protective are liable to Moody for damages under the law of Texas and Alabama.

DAMAGES

54. As a result of defendants' actions, Moody was deprived of the value of his majority interest in Empire, a company which until defendants' conspiracy took effect had a value of $25,000,000, including his interest in the $16,000,000 trust asset, and $2 million in costs expended in an attempt to combat defendants' unlawful actions. In total, Moody suffered $27,000,000 in damages.

WHEREFORE, Moody moves this Court to award him:

(1) $81,000,000 as trebled actual damages.

(2) $25,000,000 in punitive damages.

(3) Costs and attorney's fees.

Respectfully submitted,

_____

APPENDIX D

Alabama Code tit. 27 §27-32-5(b) (1977) provides (emphasis added):

> (b) The court may, at any time during a proceeding under this chapter, issue such other injunctions or orders *as may be deemed necessary to prevent* interference with the commissioner or the proceeding, or waste of the assets of the insurer, or *the commencement or prosecution of any actions,* or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the insurer or against its assets or any part thereof.

Twenty-four other states have virtually identical provisions:

Alaska Stat. §21.78.030(b) (1966)
Ariz. Rev. Stat. Ann. §20-614(B) (1975)
Ark. Stat. Ann. §66-4804(2) (1980)
Del. Code Ann. tit. 18, §5904(b) (1975)
Fla. Stat. Ann. §631.041(2) (West 1972)
Ga. Code Ann. §56-1414(2) (1977)
Haw. Rev. Stat. §431-670(b) (1976)
Idaho Code §41-3305(2) (1977)
Me. Rev. Stat. tit. 24-A, §4362(2) (1974)
Md. Ann. Code art. 48A, §135(2) (1979)
Minn. Stat. Ann. §60A.04(24) (West 1968)
Nev. Rev. Stat. §696B.270(2) (1977)
N.J. Stat. Ann. §17.30C-5(b) (West Supp. 1980)
N.Y. Ins. Law §528(2) (McKinney 1966)
N.C. Gen. Stat. §58-155.19(b) (1975)
Okla. Stat. Ann. tit. 36, §1904(B) (West 1976)
Or. Rev. Stat. §734.140(2) (1979)
S.D. Compiled Laws Ann. §58-29-12 (1978)
Tenn. Code Ann. §56-9-105 (1980)
Tex. Ins. Code Ann. tit. 21-28, §4(b) (Vernon 1963)
Utah Code Ann. §31-28-19(2) (1974)
Wash. Rev. Code Ann. §48.31.200(2) (1961)
W. Va. Code §33-10-4(b) (1975)
Wyo. Stat. §26-33-104(b) (1977)

Eight additional states' statutes, in slightly different form, empower courts to issue injunctions or orders deemed necessary to

prevent ". . . the institution or prosecution of any actions or proceedings." They are:

Cal. Ins. Code §1020(c) (West 1972)
Conn. Gen. Stat. §38-425(a)(6) (1981)
Ind. Code Ann. §27-9-1-4(6) (Burns Supp. 1980)
Ky. Rev. Stat. §304.33-050(f) (1981)
Mont. Rev. Codes Ann. §33-2-1309(f) (1979)
N.H. Rev. Stat. Ann. §402-C:5(f) (Supp. 1979)
40 Pa. Cons. Stat. Ann. §221.5(a)(vi) (Purdon Supp. 1980)
Wis. Stat. Ann. §645.05(f) (1980)

APPENDIX E

1.

Approximately 50 insurance receivership proceedings have been instituted in Texas from 1970 to the present. Permanent injunctions that bar all litigation were issued in 33 of them:

1. *State of Texas v. Dealers National Insurance Co.*, No. 182,811 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Oct. 20, 1970 at 6.
2. *The State of Texas v. Modern Investors Life Insurance Company*, No. 185,592 (167th Jud. Dist., Travis Cty., Tex.) – Order of May 14, 1972 at 5.
3. *The State of Texas v. Trans Plains Insurance Company, et al.*, No. 186,515 (53rd Jud. Dist., Travis Cty., Tex.) – Order of June 4, 1971 at 5.
4. *State of Texas v. First Fire and Casualty Insurance Company*, No. 195,205 (53rd Jud. Dist., Travis Cty., Tex.) – Order of April 12, 1973 at 5.
5. *The State of Texas v. Gene B. McFerrin, et al.*, No. 195,750 (200th Jud. Dist., Travis Cty., Tex.) – Order of June 26, 1974 at 5.
6. *The State of Texas v. Cattlemen's Life Insurance Company*, No. 196,989 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Aug. 14, 1980 at 5.
7. *State of Texas v. Empire Life Insurance Company of America, et al.*, No. 198,374 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Nov. 15, 1974 at 5.
8. *State of Texas v. Maryland National Insurance Company*, No. 198,471 (53rd Jud. Dist., Travis Cty., Tex.) – Order of June 16, 1975 at 5.
10. *The State of Texas v. National Fidelity Mutual Life Insurance Co.*, No. 218,100 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Sept. 10, 1975 at 4.
11. *The State of Texas v. James R. Hardin, Individually, and James R. Hardin, DBA Jim Hardin Insurance, et al.*, No. 222,824 (167th Jud. Dist., Travis Cty., Tex.) – Order of Oct. 1, 1974 at 5.
12. *The State of Texas v. Vehicle Warranty Corporation*, No. 224,828 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Aug. 26, 1981 at 5.

13. *The State of Texas v. National Family Mutual Life Insurance Company*, No. 232,166 (200th Jud. Dist., Travis Cty., Tex.) – Order of July 21, 1981 at 4.

14. *State of Texas v. Wisconsin Surety Corporation*, No. 232,373 (200th Jud. Dist., Travis Cty., Tex.) – Order of Dec. 29, 1975 at 4.

15. *State of Texas v. Interstate Insurance Company*, No. 232,811 (200th Jud. Dist., Travis Cty., Tex.) – Order of Dec. 12, 1975 at 4.

16. *State of Texas v. Summit Insurance Company of New York*, No. 233,370 (200th Jud. Dist., Travis Cty., Tex.) – Order of June 27, 1975 at 4.

17. *The State of Texas v. Source Life Insurance Company*, No. 234,852 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Aug. 26, 1981 at 6.

18. *The State of Texas v. Cardinal Life Insurance Company*, No. 236,899 (200th Jud. Dist., Travis Cty., Tex.) – Order of Aug. 3, 1981 at 5.

19. *State of Texas v. Mobile Insurance Company*, No. 237,782 (201st Jud. Dist., Travis Cty., Tex.) – Order of Sept. 25, 1975 at 5.

20. *State of Texas v. Mobile County Mutual Insurance Company*, No. 237,783 (201st Jud. Dist., Travis Cty., Tex.) – Order of Sept. 25, 1975 at 5.

21. *The State of Texas v. Missouri General Insurance Company*, No. 239,566 (167th Jud. Dist., Travis Cty., Tex.) – Order of March 16, 1976 at 5.

22. *The State of Texas v. Medallion Insurance Company*, No. 239,567 (167th Jud. Dist., Travis Cty., Tex.) – Order of Mar. 16, 1976 at 5.

23. *The State of Texas v. American Travelers Life Insurance Company*, No. 240,928 (200th Jud. Dist., Travis Cty., Tex.) – Order of Nov. 24, 1975 at 5.

24. *The State of Texas v. Manufacturers and Wholesalers Indemnity Exchange*, No. 242,146 (200th Jud. Dist., Travis Cty., Tex.) – Order of Feb. 10, 1976 at 5.

25. *The State of Texas v. Guthrie, Harris & Brown Insurance Company*, No. 250,160 (126th Jud. Dist., Travis Cty., Tex.) – Order of Nov. 12, 1981 at 4.

26. *The State of Texas v. Old Security Life Insurance Company,* No. 267,341 (167th Jud. Dist., Travis Cty., Tex.) – Order of Nov. 14, 1979 at 5.

27. *The State of Texas v. First American Surety Corporation,* No. 287,383 (53rd Jud. Dist., Travis Cty., Tex.) – Order of Nov. 27, 1979 at 5.

28. *The State of Texas v. Great Security Life Insurance Company,* No. 288,835 (98th Jud. Dist., Travis Cty., Tex.) – Order of July 18, 1979 at 4.

29. *The State of Texas v. Reserve Insurance Company,* No. 290,961 (147th Jud. Dist., Travis Cty., Tex.) – Order of Dec. 20, 1979 at 6.

30. *The State of Texas v. Ministers Benefit Trust, Bob A. Littlejohn, Trustee, A. Alvis Edmonson, Chairman, Benefit Committee, A.R. Wilson and Donald J. Stone, Members, Benefit Committee,* No. 314,116 (200th Jud. Dist., Travis Cty., Tex.) – Order of Dec. 19, 1980 at 6.

31. *State of Texas v. Group Health of El Paso, Inc.,* No. 319,947 (98th Jud. Dist., Travis Cty., Tex.) – Order of July 23, 1981 at 7.

32. *The State of Texas v. Proprietors' Insurance Company,* No. 324,504 (126th Jud. Dist., Travis Cty., Tex.) – Order of Jan. 26, 1982 at 6.

33. *The State of Texas v. Nation-wide Health Insurance Trust, et al.,* No. 61,240-C (149th Jud. Dist., Brazoria Cty., Tex.) – Order of Aug. 3, 1978 at 4.

2.

The National Association of Insurance Commissioners, *Manual for Receivers of Insurance Companies* (1982), provides sample forms for injunctions to be issued in insurance receiverships. A sample from Florida provides:

> 26. All persons, corporations or associations within the jurisdiction of this Court are hereby enjoined and restrained from commencing, maintaining or further prosecuting any action at law or in equity or other proceeding against Respondent or the Receiver.

Manual at 418; *see id.* at 486. A sample from New York provides:

. . . and it is further

ORDERED, that the officers, directors, trustees, policyholders, agents and employees of said SUMMIT INSURANCE COMPANY OF NEW YORK, and *all other persons be and they are hereby enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent of Insurance of the State of New York and his successors in office,* as Liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, or from in any way interfering with the Superintendent of Insurance of the State of New York, or his successors in office, in his or their possession, control or management of the property of said corporation, or in the discharge of his or their duties as Liquidator thereof, or in the liquidatioin of the business of said corporation. . . .

Manual at 432 (emphasis added).

3.

The *Manual* also lists 224 insurance companies that were placed in receivership between 1969 and 1980. *Id.* at 755-78. Some were multi-state companies. The *Manual* lists a total of nearly 400 receivership proceedings (including ancillary proceedings) for the 224 companies listed.

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No. 82-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

and

PROTECTIVE LIFE INSURANCE COMPANY,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

In the circumstances of this case and under the decisions of this Court, did the Alabama trial court, presiding over the *quasi in rem* receivership proceeding, have the authority to prohibit petitioner from filing in federal court his proposed complaint?

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OCTOBER TERM, 1982

SHEARN MOODY, JR.,
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THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

and

PROTECTIVE LIFE INSURANCE COMPANY,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

INTRODUCTION

The Petition before this Court is the ninth in a series of petitions for a writ of certiorari filed in this Court by Shearn Moody, Jr. arising out of the domiciliary and ancillary receivership proceedings in the courts of Alabama and Texas involving Empire Life Insurance Company of America ("Empire"). Petitioner ("Moody") was the chief executive officer of Empire, an insolvent Alabama insurance company. Respondents are Tharpe Forrester, who is the current Receiver of Empire, (the "Receiver") and Protective Life Insurance Company ("Protective"). This brief in opposition to Moody's ninth petition is filed jointly on behalf of the Empire Receiver and Protective.

Petitioner's efforts to nullify the liquidation of Empire and the reinsurance of Empire's policyholders by Protective have produced a never-ending stream of litigation. His efforts have been uniformly unsuccessful. This Court has, to date, denied each of Moody's eight petitions for writ of certiorari. Citations to the denials of writ of certiorari by this Court and some of the reported decisions in this protracted litigation are listed below:

Sumrall v. *Moody*, 620 F.2d 548 (5th Cir.), *on rehearing* 632 F.2d 1351 (5th Cir. 1980), *cert. denied*, 450 U.S. 1026 (1981).

Moody v. *State ex rel. Payne*, 355 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978).

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Day v. *State*, 489 S.W.2d 368 (Tex. Civ. App. 1972).

STATEMENT OF THE CASE

1. **Background**—Petitioner Shearn Moody, Jr. is the former-president, chairman of the board of directors and principal stockholder of Empire Life Insurance Company of America. On June 29, 1972, Empire was found to be impaired and insolvent and placed in receivership by the Circuit Court of Jefferson County, Alabama,[1] the Honorable William C. Barber presiding.[2] Empire was adjudicated insolvent on the grounds that a major asset of Empire, an interest in the Libbie Shearn Moody trust ("the Trust"), had been overvalued by Empire. Though an appeal from this adjudication was expressly authorized by Alabama law, Moody did not appeal.

Following a lengthy trial in the receivership proceedings, in which Moody actively participated as a party, the Alabama receivership court determined Empire to be impaired in excess of ten million dollars and insolvent in excess of six million dollars, ordered Empire liquidated, and approved reinsurance of Empire's policyholders by Protective. On Moody's appeal from these adjudications, the Alabama Supreme Court

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[1] The States of Arkansas, Montana and Texas placed Empire in ancillary receiverships.

[2] Judge Barber has presided over the entire 10-year receivership proceeding.

unanimously affirmed the receivership court. *Moody* v. *State ex rel. Payne*, 344 So. 2d 160 (Ala.), *cert. denied, Shearn Moody, Jr.* v. *Charles H. Payne, etc.*, 434 U.S. 996 (1977).

2. **The Injunction**—Petitioner instigated a rash of litigation that interfered with and threatened to halt the receivership proceedings. At the Receiver's instance, the receivership court conducted an evidentiary hearing and entered an injunction prohibiting petitioner and others from instituting litigation interfering with the receivership without prior approval of the receivership court.[3] The evidence at the hearing included testimony by the Receiver that he had been subjected, both as Receiver and individually, to numerous law suits and proceedings filed by petitioner or his attorneys, all of which related to the Empire receivership and all of which were filed after the trial in the receivership court culminating in an order that Empire be liquidated and its policies reinsured by Protective. The Receiver testified that Moody's litigation substantially depleted the assets of the receivership estate and resulted in irreparable loss to the receivership by seriously interfering with implementation of the receivership court's orders.[4]

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[3] A thorough statement of the events leading up to the issuance of the injunction is found in the opinion of the Alabama Supreme Court affirming the injunction. *Moody* v. *State ex rel. Payne*, 295 Ala. 299, 302-04, 329 So. 2d 73, 75-77 (1976).

[4] The Empire Receiver also testified about a threat made by petitioner:

> [Shearn Moody] said to me, in words to this effect that Mr. Bookout, we are just getting started on you. "I intend to sue you personally. My actions will be of a personal nature against you to carry over after you have left the office [of Commissioner of Insurance]. ***we killed Crawford Martin and somebody else, ***he died with a heart attack the day after he signed his deposition, and we are beginning on you, and we are going to keep on if it takes us 50 years."

Moody v. *State ex rel. Payne*, 295 Ala. 299, 304, 329 So. 2d 73, 76 (1976).

Petitioner appealed the grant of the injunction to the Alabama Supreme Court, arguing that *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964) [hereinafter cited as *Donovan*], precluded issuance of the injunction. The Supreme Court of Alabama upheld the injunction in *Moody* v. *State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). *See also State ex rel. Payne* v. *Empire Life Ins. Co.*, 351 So. 2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978). Moody did not seek review in this Court of the Alabama Supreme Court's rejection of his *Donovan* claim.

3. **Events After The Inunction**—In outright defiance of the injunction against him, petitioner caused to be filed an amended complaint in *Allmon* v. *Bookout, et al.*, Civ. No. 74-377-N (U.S. Dist. Ct. M.D. Ala).[1] Petitioner was adjudicated in criminal and civil contempt by the receivership court. The findings of contempt were substantially affirmed by the Alabama Supreme Court, and this Court denied Moody's petitions for certiorari. *Moody* v. *State ex rel. Payne*, 355 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978); *State ex rel. Payne* v. *Empire Life Ins. Co.*, 351 So. 2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978).

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[1] The amended complaint in *Allmon* is substantially similar to the complaint Moody now seeks to file. *See* Order of Judge Barber, Pet. App. B, ¶ 1. Both allege the same factual basis, and both complaints allege a violation of 42 U.S.C. §§ 1983, 1985, based on alleged unlawful deprivations of property, due process of law, and equal protection of the law. The federal district court dismissed the *Allmon* complaint, saying

> Effectively what the Plaintiff would have this Court do would be to assert omnipotent power and to wrest conrol of the receivership estate from a State Court of competent jurisdiction, thereby materially disrupting if not destroying the orderly function and execution of the State Court and its procedures.

Moody v. *State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976) (quoting the unpublished opinion of the federal district court).

Because petitioner is a Texas resident, the Receiver and Protective filed suit in federal district court in Texas to enforce the money judgments arising out of the contempt proceedings. The Texas federal district court gave full faith and credit to the judgments. The Fifth Circuit Court of Appeals affirmed, expressly rejecting petitioner's argument that the Alabama courts had violated or misapplied *Donovan*. *Sumrall* v. *Moody*, 620 F.2d 548 (5th Cir.), *on rehearing* 632 F.2d 1351 (5th Cir. 1980), *cert. denied*, 450 U.S. 1026 (1981). This Court denied Moody's petition for writ of certiorari. *Id.*

On June 23, 1975, petitioner requested permission to file an amended counterclaim in a civil action then pending against him in the United States District Court for the Northern District of Texas. The receivership court granted permission, but the United States District Court thereafter denied petitioner leave to amend his counterclaim. *Meyers* v. *Moody*, C.A. Nos. 3-5678-D, 3-7625-D (N.D. Tex. 1975).

On May 9, 1976, petitioner requested permission of the receivership court to institute yet another suit in the United States District Court in Texas based upon the same claims asserted in the proposed amended counterclaim. Petitioner's attorneys abandoned this request, and it was subsequently denied.

On September 28, 1976, petitioner sought, and the receivership court denied, permission to file yet another action.[4] Again arguing that the receivership court's injunction violated *Donovan*, petitioner sought review in the Alabama Supreme Court. Adhering to its earlier holding that the receivership proceeding is a *quasi in rem* proceeding, the Alabama Supreme

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[4] The complaint that Moody proposed to file in 1976 is substantially similar to the complaint Moody now seeks to file. Order of Judge Barber, Pet. App. B, ¶ 1. Both complaints allege the same factual basis, and both complaints allege violation of the antitrust laws and the common law.

Court denied relief. *Moody* v. *State ex rel. Payne*, 351 So. 2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978). This Court denied Moody's petition for writ of certiorari. *Id.*

On October 29, 1981, petitioner again requested permission to institute litigation. Petitioner sought to sue the former Empire Receiver, the State of Texas, Protective, and others. The receivership court denied Moody's request. The receivership court reasoned that its ruling was governed by *Moody* v. *State ex rel. Payne*, 351 So. 2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978), in which the Alabama Supreme Court had applied *Donovan* in earlier Moody litigation. The receivership court "found that the proposed litigation did involve the Empire receivership proceeding and would interfere with, delay and seek to stop these proceedings. Therefore the court concluded that the court had ample authority to deny permission to sue." Answer of Judge Barber to Petition for Writ of Mandamus at ¶ 19. The court noted, *inter alia*, that the merits of petitioner's claims had been previously and finally adjudicated; that Moody had pursued a pattern of harassing and vexatious litigation inextricably involved with the receivership proceeding; and that petitioner had admitted under oath that he attempted to use the federal courts as a means to circumvent the receivership court's orders. Concluding that "a proper exercise of judicial discretion called for a denial of Moody's motion for permission to sue," the court denied the motion. *Id.* at ¶ 24.

Arguing that the denial of permission violated *Donovan*, Moody petitioned the Alabama Supreme Court for a writ of mandamus to compel the receivership court to grant permission to sue. The Alabama Supreme Court refused to grant the writ.[7] Moody now petitions this Court for review.[8]

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[7] Noting that the Alabama Supreme Court did not hear oral argument and that it issued a one-and-a-half page opinion, petitioner intimates that the Alabama Supreme Court failed to give serious consideration to his petition for writ of mandamus. (Pet. at 8) But peti-

ARGUMENT

1. Contrary To Petitioner's Argument, The Ruling Of The Alabama Courts Is Consistent With The Decisions Of This Court.

Time and again, this Court has been urged by petitioner to engage in piecemeal review of the voluminous record of the Empire receivership proceedings. The instant petition is, in substance, no different from Moody's previous unsuccessful efforts. Again, petitioner distorts the proceedings below by presenting incomplete fragments of the case. Petitioner ignores the full record below and strains mightily to secure review in this Court by glib and formalistic characterizations of the decisions below as embracing a new and different rule (Pet. at 9, 12), that effectively overrules this Court's decisions (Pet. at 11), and conflicts with several other federal decisions (Pet. 12-15), that presents a question of national importance (Pet. at 15), that deprives federal courts of jurisdiction (Pet. at 16, 17), and that is particularly invidious (Pet. at 18).

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tioner ignores the voluminous record. Under Alabama law, the Alabama Supreme Court takes judicial notice of the record of all former proceedings before it. *E.g., FDIC* v. *Equitable Life Assur. Soc. of U.S.*, 289 Ala. 192, 266 So. 2d 752 (1972); *Holz* v. *Lyles*, 287 Ala. 280, 251 So. 2d 583 (1971). In light of this judicial notice and the five reported *Moody* cases decided by the Alabama court, two of which specifically analyzed and rejected petitioner's *Donovan* argument in the context of this litigation, it is obvious that petitioner's suggestion that the Alabama Supreme Court acted capriciously is erroneous. Likewise frivolous is petitioner's suggestion that he was deprived of oral argument. (Pet. at 8). In fact the record shows no timely request for oral argument was made.

[1] We note that Moody's petition for writ of certiorari fails to comply with Rule 23(f) of the Rules of this Court in that it fails to demonstrate with specificity that each federal question sought to be reviewed was appropriately raised before both the receivership court and the Alabama Supreme Court.

Petitioner's desperate and distorted exaggerations are not supported by the record below. The decisions of the Alabama Courts are consonant with applicable decisions of this Court. There is no conflict with other federal decisions, and petitioner's reasons for granting the writ are without merit.

The main thrust of the petition for writ of certiorari is that the Alabama courts misapplied this Court's decision in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964).[9] Petitioner has advanced this argument on numerous other occasions concerning virtually identical facts. On three previous occasions, the Alabama Supreme Court rejected petitioner's argument; on two of those occasions, petitioner unsuccessfully sought review by this Court.[10] *See Moody* v. *State ex rel. Payne*, 351 So. 2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978); *Moody* v. *State ex rel. Payne*, 355 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978). On the other occasion, Moody acquiesced in the Alabama Supreme Court's rejection of his *Donovan* argument by failing to seek review in this Court. *Moody* v. *State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976).

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[9] The other United States Supreme Court case principally relied upon by Moody, *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977), merely reaffirmed the *Donovan* general rule as applied to strictly *in personam* litigation. *General Atomic* did not address the exclusive-jurisdiction exception to the *Donovan* rule and thus is not germane.

[10] Petitioner now asserts that, on the previous occasions he has urged that the application of the injunction violated the principles of *Donovan*, the *Donovan* issue was not clearly presented (Pet. at 4). As this Court's records reveal, however, this admission directly contradicts petitioner's previous representations to this Court. For instance, in his brief in No. 77-1109, petitioner set forth as the only question presented:

> Whether a state court is wholly without power, by virtue of the Supremacy Clause of the United States Constitution, to enjoin or to refuse to permit the filing of an *in personam* federal antitrust suit in a federal court on the ground that (a) a corporate

Moreover, petitioner has pressed his *Donovan* argument in the lower federal courts. The Fifth Circuit rejected petitioner's argument, and this Court denied review. *See Sumrall* v. *Moody*, 620 F.2d 548 (5th Cir.), *on rehearing*, 632 F.2d 1351 (5th Cir. 1980), *cert. denied*, 450 U.S. 1026 (1981). Apparently undaunted, petitioner again urges that the Alabama receivership court ignored or overruled *Donovan*.

But petitioner misconstrues the holdings of the Alabama courts. Suggesting that he was enjoined merely because his proposed litigation was harassing and vexatious, petitioner argues that the Alabama courts ignored *Donovan* and other decisions of this Court. This simply is not true. Rather, the Alabama receivership court once again faithfully observed the applicable standards recognized by this Court and the Alabama Supreme Court. The receivership court relied on the *quasi in rem* exception to the general rule discussed in *Donovan* and determined it had authority to restrain petitioner from instituting the proposed litigation. Then, the receivership court, based on its intimate knowledge of the full record of the Empire receivership proceedings, its review of the substance and purpose of Moody's proposed complaint, and Moody's track record of harassing litigation in the past, concluded that the authority to restrain petitioner should be exercised. The Alabama Supreme Court declined to grant mandamus.

There is no dispute that, absent special circumstances, state courts may not restrain litigants from proceeding in federal court. This Court has expressly recognized, however, that an ex-

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receivership proceeding pending in the state court is considered an *in rem* proceeding, and (b) the filing of the antitrust suit would allegedly interfere with, delay and eventually stop the state receivership proceeding.

Id. at 2 (*cert. denied* at 435 U.S. 969). *See, e.g.*, Petitioner's briefs in No. 78-110 (*cert. denied* at 439 U.S. 910); No. 80-1235 (*cert. denied* at 450 U.S. 1026).

ception to this general rule "has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed." *Donovan* v. *Dallas, supra,* 377 U.S. at 412, *citing Princess Lida* v. *Thompson,* 305 U.S. 456, 465-468 (1939).

Applying the *in rem* exception in *Princess Lida* v. *Thompson,* 305 U.S. 456 (1939), this Court approved a state-court injunction prohibiting litigation from proceeding in federal court. This Court stated:

> [W]here the judgment sought is *strictly in personam,* both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought [then] the jurisdiction of one court must yield to that of the other. *We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other,* is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but *applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to harmonious cooperation of federal and state tribunals.*

305 U.S. at 466. (footnotes omitted) (emphasis supplied). *Accord Kline* v. *Burke Construction Co.,* 260 U.S. 226, 229 (1922).

Time and again the Alabama and federal courts have held that the Empire receivership proceeding is *in rem* or *quasi in rem*. Petitioner seeks to avoid this settled authority by characterizing his proposed complaint as seeking only money damages and as not naming the current Receiver as a party.[11] Thus, petitioner alleges that his proposed action is *in personam* and cannot be enjoined. But the basis of the *quasi in rem* receivership proceeding is the insolvency of Empire, which rests on the valuation of the Trust. By his proposed action petitioner seeks to relitigate the value of the Trust and the propriety of placing Empire in receivership. *See* Pet. App. C. If it be assumed, *arguendo*, that Moody succeeds in collaterally attacking the receivership court's most fundamental rulings, the jurisdiction of the receivership court would be impaired if not destroyed. Nothing could be more destructive of the receivership court's jurisdiction over the receivership of Empire than another court's determination that the Trust was improperly valued and thus that Empire was wrongfully placed in receivership. Moreover, by his proposed action, petitioner seeks to recover for damage to Empire. To that extent the proposed action is derivative. *See supra*, note 11. It is difficult to conceive of a more destructive assault on the receivership court's jurisdic-

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[11] Though petitioner's proposed complaint does not name the current Receiver as a defendant, petitioner seeks to recover for alleged damage to Empire resulting from alleged antitrust violations. *See* Pet. App. C, ¶ 51. Since the alleged damage was to the corporate entity, it appears petitioner's claim is derivative. To maintain a shareholder derivative action, petitioner must allege and prove bad faith on the part of the directors of the corporation for failure to sue in the corporate name. *E.g.*, *Ash* v. *IBM*, 353 F.2d 491, 493 (3rd Cir. 1965), *cert. denied*, 384 U.S. 927 (1966). Of course, the directors of Empire have been replaced by the Receiver; thus, to maintain his proposed action, petitioner must allege and prove that the Receiver acted in bad faith by failing to bring suit for the alleged antitrust violations. *See generally* II P. Areeda & D. Turner, Antitrust Law § 336e (1978). Such litigation would surely disrupt the receivership proceeding.

tion than collateral attacks on actions by the current and former Receivers—actions taken under the authority of the ongoing receivership proceeding. As this Court has said, "where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction." *Kline* v. *Burke Construction Co., supra,* 260 U.S. at 229.

2. The Ruling Below Does Not Conflict With The Decisions Of The Lower Federal Courts.

Petitioner cites three opinion of federal courts, asserting that these decisions conflict with the holding below. *Central States, Southeast & Southwest Areas Health and Welfare Fund* v. *Old Security Life Ins. Co.,* 600 F.2d 671 (7th Cir. 1979); *Slotkin* v. *Brookdale Hospital Center,* 357 F. Supp. 705 (S.D.N.Y. 1972); *Mills* v. *Roanoke Ind. Loan & Thrift,* 70 F.R.D. 448 (W.D. Va. 1975). In each of these cases, federal plaintiffs sued the entity in receivership (or liquidation) for acts done by the entity before it was placed in receivership. In none of the cases did the plaintiff challenge the basis on which the entity had been placed in receivership or the actions of the receiver. In none of the cases did the plaintiff seek to relitigate the issue upon which the court's jurisdiction over the insolvent entity was based. In none of the cases would a judgment for plaintiff have rendered a nullity the actions of the receivership court. None of the cases cited by petitioner is in conflict with the ruling below.

3. Petitioner's Other Arguments Have No Merit.

In a strained attempt to cast this case as one of national importance, petitioner points out that 33 states have statutes expressly providing for injunctions in insurance receivership or liquidation cases. Even without statutory authorization, a court of equity has the power to restrain litigation that threatens to destroy its jurisdiction over a res. *See, e.g., Princess Lida* v. *Thompson,* 305 U.S. 456 (1939). Thus, it is of no significance

that 33 states have enacted statutes authorizing injunctions. Moreover, because of the unique circumstances of this case, including a 10-year battle by petitioner through harassing litigation to stop the receivership proceeding, the instant case is of virtually no precedential use for others seeking or opposing injunctions in the receivership context.

Petitioner also urges that, because he may not file the proposed complaint in federal court, the Article III power of the federal courts has been somehow abridged. Petitioner's argument has no merit, for this Court has specifically upheld a state-court injunction prohibiting litigants from proceeding in federal court. Clearly, in *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939), this Court denied the federal district court the power to decide its own jurisdiction. There was no infringement of the Article III power of the federal courts in *Princess Lida*, and there is no such infringement here. Unless this Court is to overrule its prior decisions, petitioner's argument is without merit.

Finally, petitioner argues that the state-court injunction denies him his first amendment right to petition the federal courts for redress of grievances. But petitioner again fails to recognize that this Court has specifically upheld a state court injunction prohibiting a litigant from petitioning a federal court for redress of grievances. Clearly, in *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939), this Court denied the litigant from petitioning a federal court for redress of grievances. There was no infringement of first amendment rights in *Princess Lida*, and there is no such infringement here. Unless this Court is to overrule its prior decisions, petitioner's argument is without merit.

CONCLUSION

Based on the foregoing authorities and analysis, the petition is due to be denied.

Respectfully submitted,

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No. 82-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA ex rel.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

PETITIONER'S REPLY BRIEF

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249 U.S. 47 (1919) 4

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310 U.S. 88 (1940) 5

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PETITIONER'S REPLY BRIEF

1.

Adjectives aside,[1] respondents' opposition relies wholly on a misconception of the issue this petition presents.[2] Respondents

[1] *See* Joint Brief in Opposition to Petition for Writ of Certiorari (Jt. Opp.) at 8 ("glib and formalistic"), 9 ("desperate and distorted"), 13 ("strained").

[2] All the questions presented here were preserved below in both the Jefferson County Circuit Court and the Alabama Supreme Court: the

(continued)

harp on the *quasi in rem* nature of the Alabama insurance receivership proceeding as disposing of this case, ignoring that this is only half of what is necessary before a state court may enjoin federal litigation. The other half of the permissible basis for such injunction is that the lawsuit *to be enjoined* also must be *in rem* or *quasi in rem;* and if the proposed federal action is not *in rem* but is *in personam,* then the state may not enjoin its filing and prosecution, *see* Petition for Certiorari (Pet.) 9-12.[3] As respondents seem to concede (Jt. Opp. 12),the proposed federal action here is undeniably *in personam.*[4]

(continued from previous page)

Donovan issue, Pet. 9-12 (Reason for granting the Writ 1), Motion for Order Permitting Shearn Moody, Jr. to Institute Litigation (Circuit Court) at 1-2, Petition for Writ of Mandamus (Alabama Supreme Court) at 6; the conflict that denial to petitioner of his right to institute an *in personam* action would present with lower federal court decisions, Pet. 12-15 (Reason 2), Motion at 4, Petition for Mandamus at 7; such a decision's interference with federal courts' jurisdiction, Pet. 16-17 (Reason 4), Motion at 6, Petition for Mandamus at 14-15; and such a decision's abridgement of petitioner's right to petition the federal courts for redress of grievances, Pet. 18-19 (Reason 5), Motion at 8, Petition for Mandamus at 17. The national importance of this case because of the proliferation of anti-litigation statutes in other states, Pet. 15-16 (Reason 3), which is especially pertinent to this Court's exercise of certiorari jurisdiction, was not discussed below, as beyond the competence of the Alabama courts to consider.

[3]Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939), makes this clear. In the paragraph respondents themselves quote (Jt. Opp. 11), Princess Lida held:

> Where the judgment *sought* is strictly in personam, both the state and federal court may proceed with the litigation . . . On the other hand, if the *two* suits are in rem, or quasi in rem, . . . the jurisdiction of one court must yield to that of the other.

Id. at 466 (emphasis added).

[4]Respondents simply misread the proposed complaint in saying that petitioner seeks to recover for damage "to" Empire (Jt. Opp. 12 n. 11).

(continued)

2.

To say, as respondents do, that *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), interpreted the *Donovan (v. City of Dallas*, 377 U.S. 408 (1964)) rule as prohibiting state court injunctions against only "strictly *in personam* litigation" (Jt. Opp. 9 n. 9), does not help to make Alabama's actions proper. Petitioner's proposed litigation, which Alabama enjoined, is "strictly *in personam.*" *Donovan* and *General Atomic* squarely apply, and require reversal of the lower courts' decisions enjoining prosecution of that litigation. In these circumstances "the *quasi in rem* exception to the general rule discussed in *Donovan*" did not permit Alabama to "restrain petitioner from instituting the proposed litigation" (Jt. Opp. 10).[3]

3.

Apparently aware of their fallacy, respondents try to bring this case within the *Donovan* rule. They assert (Jt. Opp. 12) that

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(continued from previous page)

Petitioner seeks to recover for his loss of the value of his stock interest ownership *in* Empire, for tortious deprivation of constitutional rights, for violation of federal statutes and for tortious conspiracy. Pet. App. C 10-12; *see*, in particular, ¶ 54 "Damages", *id.* 12: "[a]s a result of defendants' actions Moody was deprived of the value of his majority interest in Empire . . . ." Even if petitioner's proposed action were a derivative suit, that would not change the nature of the relief it seeks, namely money damages.

[3]Respondent appears to suggest that the lower courts correctly denied petitioner the right to file his federal action because it was like another action dismissed by a federal court in 1975 (Jt. Opp. at 5 n. 5), or like other complaints whose filing Alabama had denied or had punished (*Id.* 6, 7). This sounds like a *res judicata* argument — which might be appealing if this Court had not squarely rejected just that argument in *Donovan* and *General Atomic*. *See* Pet. 9-10 n. 11, quoting *General Atomic*, 434 U.S. at 17. And *see* the brief of the American Civil Liberties Union as *amicus curiae*, at 5-9.

a decision in petitioner's proposed *in personam* action, determining that fraud and conspiracy indeed had infected the receivership, would somehow affect the receivership court's jurisdiction and could therefore be enjoined. Yet such a decision in a purely *in personam* action for money damages would do no more than require the liable defendants to pay petitioner money, as damages. The receivership court's disposition of the *res*, the corporation (Empire Life) and its assets (insurance policies and property) could not be affected, and its jurisdiction would remain unimpaired.

4.

Respondents conclude by arguing (Jt. Opp. 14) that the decisions below are consistent with Article III (*see* Pet. 16-17) and the First Amendment (*see* Pet. 18-19). It is of course correct that a state court may enjoin a federal *in rem* action that would disturb a state court's *in rem* jurisdiction over the same *res*, and that in such a case this Court would not hold that the state's injunction unconstitutionally interferes with federal court jurisdiction or a litigant's right to petition the federal courts for redress of grievances.[6] The point is that this Court's decisions in *Donovan, Princess Lida* and *General Atomic* set the limits beyond which the states must not go; limits that Alabama plainly has overstepped here.[7] For respondents to urge that these decisions make Alabama's action here constitutionally permissible is like suggesting that because a state may punish one who "falsely shouts fire in a theater," *Schenck v. United States*, 249 U.S. 47, 52 (1919), a state may also ignore the First Amendment

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[6]*See* the Brief of the Texas Institute of Government as *amicus curiae*, at 11-16.

[7]The Alabama Supreme Court's failure was not in declining to hear oral argument here (*see* Jt. Opp. at 7-8 n. 8), but in its decision, in which it gave no consideration to *Donovan* and its progeny or to the constitutional issues involved, and declared a new rule altogether at variance with *Donovan*. Pet. 8.

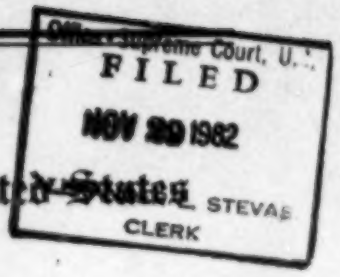
and punish other kinds of speech it considers offensive, like peaceful picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), or comments on judicial proceedings, *Bridges v. California*, 314 U.S. 252 (1941).

Respectfully submitted,

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December 30, 1982

No. 82-740



IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,

Petitioner,

—v.—

STATE OF ALABAMA ex rel. THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA,

—and—

PROTECTIVE LIFE INSURANCE CO.,

Respondents.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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November 24, 1982

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA EX. REL.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The American Civil Liberties Union is a nationwide organization of over 250,000 persons dedicated to the preservation and enforcement of constitutional rights. The Texas Civil Liberties Union is one of its state affiliates. Together, they respectfully move for leave to file attached brief amici curiae in support of the petition for

certiorari. Petitioner, but not respondents, has consented to the filing of this brief.

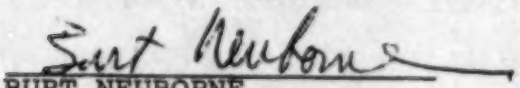
The principal mechanism which our system has evolved to enforce constitutional limitations on government behavior is a complaint by a private litigant to an independent judge that government officials have acted in excess of their delineated authority. The decision of the Supreme Court of Alabama below threatens that mechanism by authorizing government officials to enjoin private citizens from seeking judicial relief against allegedly unlawful government activity. While amici lack both the knowledge and expertise to evaluate petitioner's claims on the merits, his ability to present them to an appropriate judge

for appropriate disposition lies at the heart of our system of constitutional government.

Amici recognize that briefs amici curiae in support of petitions for cetiorari are not favored by this Court, and we have accordingly adopted a policy against filing such briefs except in narrow circumstances. However, the potential significance of Alabama's refusal to permit a Texas resident to assert an in personam damage claim against government defendants in an appropriate Federal Court for that court's independent evaluation raises issues of sufficient systemic significance to warrant a departure from that general policy, and the filing of

the attached brief amici curiae.

Respectfully submitted,



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INTEREST OF AMICI CURIAE

The interest of Amici Curiae is set out in the foregoing motion.

STATEMENT OF THE CASE

This petition arises out of a 1972 decision by Alabama's insurance officials to place a life insurance company owned by petitioner into receivership and, ultimately, into liquidation. Petitioner claims that, instead of appropriate regulation, the actions of the Alabama officials were part of an elaborate conspiracy to steal his company and to punish him financially for his political activities. If true, petitioner's allegations state claims for both statutory and constitutional relief.

When petitioner initially sought to raise his claims in federal court,

he was met with an Alabama injunction, issued at the behest of the potential defendants, which precluded petitioner from challenging the receivership and liquidation in any forum except the Circuit Court of Jefferson County Alabama. During the active pendency of the receivership proceedings, the injunction was arguably authorized by an expansive reading of Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939), which permits state court injunction necessary to preserve in rem jurisdiction over a specific res. 1/ With the virtual completion of

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1/ Petitioner's earlier unsuccessful attempts to obtain leave to raise his claims are reported at Moody v. State ex rel. Payne, 355 So. 2d 1116 (Ala.), cert. denied, 439 U.S. 910 (1968); Moody v. State ex rel. Payne, 351 So.2d 552 (Ala. 1977), cert. denied, 435 U.S. 964 (1978); State ex rel. Payne v.

(Continued on next page)

the receivership and liquidation proceedings, however, the Princess Lida exception no longer even arguably justifies the issuance of state injunctive relief barring petitioner from the federal courts. The Alabama courts below, however, declined to permit petitioner to present his damage claims to an appropriate federal court because, in the view of the Alabama courts, his claims are "inextricably connected" with the completed receivership proceeding. Thus, the Alabama injunction has progressed from an arguably appropriate device to assure the orderly administration of an insurance

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Empire Life Insurance Company, 351 So. 2d 538 (Ala. 1977), cert. denied, 435 U.S. 969 (1978); Moody v. State ex rel. Payne, 329 So.2d 73 (Ala. 1976). See also Sumrall v. Moody, 620 F.2d 548 (5th Cir. 1980), on reh. 632 F.2d 1351 (5th Cir. 1980), cert denied sub nom. Moody v. Forresster, 450 U.S. 1026 (1981)

receivership proceeding to an attempt by the Alabama courts to prevent the relitigation of *in personam* claims which Alabama asserts were determined adversely to petitioner during the *in rem* receivership proceedings.[2/] The precise *res judicta* effect of the *in rem* Alabama receivership proceeding is an issue of no small difficulty. It would, however, constitute a

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2/ The order and decree of the Circuit Court of Jefferson County which declined to permit petitioner to commence a federal action, stated in part:

> "Contrary to the allegations by Moody set forth in the proposed complaint that he now seeks to file, this Court has previously and finally adjudicated that Moody's claims of conspiracy and wrongful actions by Protective and the original receiver have no merit." Appendix B2, to the Petition for Writ of Centiorari.

radical departure from generally accepted rules of federalism and judicial administration to permit Alabama to dictate the res judicata effect of its own judgments by the drastic expedient of enjoining the filing of subsequent litigation in federal court.

Reasons for Granting the Writ

FUNDAMENTAL PRINCIPLES OF FEDERALISM AND JUDICIAL ADMINISTRATION PRECLUDE A STATE COURT FROM UNILATERALLY SEEKING TO DETERMINE THE RES JUDICATA EFFECT OF ITS OWN JUDGMENT BY ENJOINING RELATED LITIGATION IN FEDERAL COURT.

This Court has consistently recognized that fundamental principles of federalism and orderly judicial administration preclude a state or federal court from seeking to define unilaterally the res judicata effect of its own judgments by enjoining the prosecution of future litigation.

For example, in Kline v. Burke Const. Co., 260 U.S. 226 (1922), this Court ruled that the res judicata effect of a federal judgment on a subsequent state proceeding was to be determined by the state court "as it would determine any other question of fact or law," 260 U.S. at 230, and not by a pre-emptive federal injunction against relitigation. Similarly in Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941), this Court rejected the suggestion that a federal court may enjoin a state court from considering issues which the federal court deems to have been settled in a prior federal action. See also Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970); Vendo Co. v. Lektro-Vend

Corp., 433 U.S. 623 (1977).[3/]

Conversely, in Donovan v. City of Dallas, 377 U.S. 408 (1964), this Court ruled that a state court lacked power to enjoin a subsequent federal action merely because the state court believed that the issue had been definitively settled in the state courts. As this Court noted in Donovan:

> It may be that a full hearing in an appropriate court would justify a finding that the

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3/ The 1948 Amendments to 28 U.S.C. § 2283 (the Anti-Injunction Act) authorize a federal court to issue an injunction "where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." The Revisers Notes indicate that the purpose of the amendment was to modify Mitchum v. Foster, 407 U.S. 225. But even if the 1948 Amendments overrule Kline and Toucey no similar statutory authority exists which would justify a state court injunction against a federal proceeding. See General Atomic Co. v. Felter, 434 U.S. 12, 19-21 (1977) (Rehnquist, J. dissenting).

> state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, a question as to which we express no opinion. But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional policy. And whether or not a plea of res judicata would be good is a question for the federal court to decide. 377 U.S. at 412-13.

Similarly, in General Atomic Co. v. Felter, 434 U.S. 12 (1977), this Court applied Donovan to bar summarily the New Mexico courts from enjoining the prosecution of future federal actions deemed duplicative and vexations by the New Mexico judiciary.

With the virtual completion of receivership and liquidation proceedings in the Alabama courts, the continued enforcement of a ban on litigation seeking damages for an alleged

conspiracy to steal petitioner's insurance company is nothing more than an attempt by Alabama to enforce the res judicata effects of its judgment by pre-emptive injunction in direct contravention of General Atomic, Donovan, Toucey and Kline.

Nor does the continued technical pendency of the Alabama receivership proceeding justify an injunction against the federal action. While state and federal courts may -- and should -- seek to avoid the simultaneous consideration of similar issues through techniques such as comity and abstention, see, eg. Younger v. Harris, 401 U.S. 37 (1971); R.R. Com'n of Texas v. Pullman, 312 U.S. 496 (1941); Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976),

neither court system should seek to preserve its jurisdiction by enjoining the prosecution of simultaneous actions in the other. For the essence of the abstention doctrine is a decision by Court B not to intrude on Court A, not an injunction by Court A barring Court B from doing so. Thus, in Mandeville v. Canterbury, 318 U.S. 47 (1943), for example, a plaintiff sued in federal court to determine rights in a trust. While the federal claim was pending, the trustees sued in state court to quiet title to the trust assets. This Court ruled that the federal court lacked power to enjoin the state proceedings.[7/] Conversely, in Markham v.

7/ It is unclear whether this Court's decision in Mandeville has been affected by the "in aid of jurisdiction" language added to 28 U.S.C. § 2283 in 1948. Of course, when a federal court injunction of state judicial proceedings is necessary to enforce federal constitutional rights, no doubt exists as to the fed-

(footnote continued on following page)

Allen, 326 U.S. 490 (1946), this Court ruled that the pendency of a probate action in the California courts did not preclude a subsequent action in federal court by the Alien Property Administrator seeking the assets in question. Accordingly, while the technical pendency of receivership proceedings in Alabama might well induce a federal court to abstain under Younger or Pullman, that decision may not be pre-empted by a state injunction against the filing of a federal complaint.

Of course, where any court -- state or federal -- is engaged in the resolution of disputes concerning the ownership of specified property within its jurisdiction, concern for orderly judicial administration argues strongly that

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(footnote continued from preceding page)
eral court's power. Ex parte Young, 200 U.S. 123 (1908). Compare Tarble's Case, 13 Wall 397, 20 L.Ed. 597 (U.S. 1872).

the court be permitted to carry out its functions free from the distraction of simultaneous litigation affecting the res. E.g., Hagans v. Lucas, 10 Pet. 400 (U.S. 1836); Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939). Such a concern is particularly important in the context of judicial proceedings designed to marshall and distribute the assets of a threatened entity. Thus, as early as the Bankruptcy Act of 1867, bankruptcy courts were empowered to enjoin state proceedings affecting the bankrupt's assets. 14 Stat. 526. Accordingly, amici had no quarrel with the Alabama injunction insofar as it permitted the orderly marshalling and distribution of the assets in question. However, with the completion of the distribution of the assets in question, no functional justification exists for continuation of the injunction against

related litigation in federal court.[8] The mere fact that the Alabama proceedings were in rem cannot establish a mystical bar to the very assertion of petitioner's claim that the Alabama proceedings were procured by fraud and constituted a perversion of the legal process.[9] Cf. Shaffer v. Heitner, 433 U.S. 186 (1977).

8/ "After Donovan, a state court may enjoin the continued prosecution of a federal proceeding only when it has custody of property in in rem a quasi in rem proceedings, and the injunction is needed to protect the property." Bator, Shapiro, Mishkin and Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, 2nd ed. at 1238 (emphasis added).

9/ As in Donovan it is possible that an appropriate federal court will hold petitioner's claim barred by res judicata. Cf. Allen v. McCurry, 449 U.S. 90 (1981).

CONCLUSION

For the above-stated reasons, amici respectfully suggest that this Court follow the practice established in General Atomic Co. v. Felter 434 U.S. 12 (1977), and summarily reverse the decision of the Supreme Court of Alabama, thus permitting an appropriate United States District Court, and not the Supreme Court of Alabama, to determine whether petitioner's federal claims are barred by res judicata on comity.

Respectfully submitted,

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November 24, 1982

MOTION FILED
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No. 82-740

IN THE
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OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,
v.
STATE OF ALABAMA EX REL.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA
and
PROTECTIVE LIFE INSURANCE CO.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE CONSERVATIVE CAUCUS, INC.

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IN THE

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OCTOBER TERM, 1982

No. 82-740

SHEARN MOODY, JR.,
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v.

STATE OF ALABAMA EX REL.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE CONSERVATIVE CAUCUS, INC. IN SUPPORT OF PETITIONER

The Conservative Caucus, Inc. hereby respectfully requests leave to file the attached brief amicus curiae in support of the petition for writ of certiorari in this case. Counsel for petitioner have consented to the filing of the brief. Counsel for respondents have refused consent.

Amicus is a non-profit organization founded in 1974 to advance various conservative policy objectives. With over four hundred thousand supporters, the Conservative Caucus is one of the largest conservatively-oriented "grass roots" lobbying organizations in the country.

Amicus is currently engaged in a major project to develop and promote legislative proposals for reform of the federal judicial system. This project focuses, *inter alia*, on issues relating to the relationship between federal and state courts. Amicus is thus keenly interested in the issues presented by the petition. Although Amicus believes that the powers of the federal courts should be curtailed in certain respects, Amicus is also committed to the proposition that state courts are without power to foreclose a federal litigant's right of access to federal court.

Accordingly, Amicus respectfully requests that it be permitted to state its views on the merits of the petition. The principal argument that we wish to make, and which is set forth in the attached brief, is that federal courts must not be deprived of authority to make their own determinations about the appropriate exercise of their jurisdiction. The decision below, sustaining a state court injunction against judicial proceedings in a federal court, purports to do precisely that.

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On Petition for Writ of Certiorari to the Supreme Court of Alabama

---

BRIEF OF AMICUS CURIAE THE CONSERVATIVE CAUCUS, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of amicus in this case is set forth in the foregoing motion.

INTRODUCTION AND STATEMENT

This case concerns the authority of a state court to preemptively oust federal courts of jurisdiction to adjudicate federal claims. Although this Court has disapproved the practice on several occasions, *see Donovan v. City of Dallas*, 377 U.S. 408 (1964), *General Atomic Co. v.*

Felter, 434 U.S. 12 (1977), the Alabama Supreme Court has prohibited petitioner from bringing a purely in personam suit for damages in the federal courts of Texas. Rather than permit the federal courts to determine in the first instance whether they will proceed with petitioner's claims, the Alabama Supreme Court has held that petitioner may be enjoined, upon pain of contempt, from even initiating his federal court suit. The sole justification offered for this holding is that the unfiled federal action is "inextricably connected with" a pending in rem proceeding in Alabama state court and that the action "would be an interference" with this proceeding. Pet. App. A2.

The petition arises out of a receivership proceeding brought against a life insurance company in the Circuit Court for Jefferson County, Alabama (the "receivership court"). Petitioner is the principal stockholder and former president of this company. In 1975, after placing the company in receivership and ordering the liquidation of its assets, the receivership court enjoined petitioner from initiating any legal proceedings concerning or affecting the receivership without first obtaining the court's permission. The injunction purported to bar suits in any forum, state or federal, whether filed in petitioner's name or on behalf of another party. Pet. at 5, 6.

Having run afoul of this injunction on past occasions,[1] petitioner sought permission from the receivership court

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[1] In 1975 the receivership court found petitioner in violation of this injunction for aiding a policy holder of the insurance company in his suit against the receiver. *Moody v. State ex rel. Payne*, 335 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978). Petitioner was subsequently sued for damages on the basis of this finding and a judgment against petitioner was affirmed by the Fifth Circuit. *Sumrall v. Moody*, 620 F.2d 548 (5th Cir. 1980), *on rehearing*, 632 F.2d 1351 (5th Cir. 1980), *cert. denied sub nom. Moody v. Forresster*, 450 U.S. 1026 (1981). In 1976, the receivership court denied petitioner permission to file a separate civil action in federal court. This denial was affirmed by the Alabama Supreme Court. *Moody v. State ex rel. Payne*, 351 So. 2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 964 (1978).

to file the federal suit at issue in this case. The proposed complaint states causes of action under the Constitution and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*, and the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964(c). Named as defendants are nine individuals, one corporate defendant, and the state of Texas. The proposed action requests no relief other than damages against the defendants individually, and names neither the current receiver nor the receivership court as defendants. Pet. App. C12.

The receivership court denied permission to file the federal complaint, finding that petitioner's claims "would interfere with, delay, and seek to stop [the receivership] proceedings." Pet. App. B2. On petition for a writ of mandamus, the Alabama Supreme Court affirmed this decision. The court below held that:

> the proposed civil action for damages is inextricably connected with the . . . receivership. To permit the suit would be an interference with the receivership and therefore mandamus is denied. Pet. App. A2.

This usurpation of federal judicial authority, depriving petitioner of his right to prosecute federal claims in the federal courts, should not be tolerated. At issue here is not the ultimate choice of forum—state court or federal court—for the adjudication of petitioner's claims. Rather, the issue is whether a state court may make that choice unilaterally, and then enforce its decision by means of an injunction barring federal court consideration of the question. Amicus submits that it is for the federal courts to decide whether they have jurisdiction to adjudicate petitioner's claims and, if so, whether principles of res judicata, abstention, and other prudential doctrines will permit such adjudication. That power may not be preempted at the whim of a state receivership court.

This brief is divided into two sections. The first demonstrates that the decision of the Alabama Supreme Court is in direct conflict with this Court's decision in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), and related cases. *Donovan* establishes that state courts are without power to enjoin federal court suits, subject to one very narrow exception: a state court having in rem jurisdiction may enjoin a subsequently filed federal court action based on in rem jurisdiction over the same res. As we show, the reasons for this exception to the anti-injunction rule make clear that it may not be broadened, as the Alabama Supreme Court has attempted, to cover not only in rem and quasi in rem suits, but also purely in personam suits that might cause an "interference" with an in rem proceeding in state court.

Second, we demonstrate that, if permitted to stand, the decision of the Alabama Supreme Court will have far-reaching and important consequences. The issue presented here is not confined to petitioner; the state court authority asserted by the Alabama Supreme Court is codified in the statutes of at least twenty-five states. Pet. App. D. Moreover, the unfairness caused by this assertion of judicial power is severe. The effect of a state court injunction against the bringing of a federal court suit is not merely the preclusion of a federal forum. In many cases, the effect is the preclusion of the plaintiff's claims altogether, whether in state or federal court.

Amicus urges that this Court grant the petition and reverse the decision of the Alabama Supreme Court. We note that in a recent and similar case this Court summarily vacated a state court injunction against proceedings in a federal court. *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). Summary disposition may also be appropriate here.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ALABAMA SUPREME COURT IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *DONOVAN* v. *CITY OF DALLAS*.

The decisions of this Court make clear that a state court is without power to enjoin a federal court suit of the type at issue here—a purely in personam action for damages. Although the Alabama Supreme Court purported to justify the injunction on grounds that petitioner's federal suit would cause an "interference" with the pending state receivership proceeding, there simply is no such exception to the anti-injunction rule. The decision below is therefore directly at odds with this Court's precedents.

a. State Courts Are Without Power to Enjoin In Personam Federal Court Actions.

The anti-injunction rule was established in *Donovan v. City of Dallas, supra*, and several related cases. *General Atomic Co. v. Felter, supra*; *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939). In *Donovan* a plaintiff class brought an action in Texas state court challenging the issuance of revenue bonds for construction of a municipal airport that it opposed. After final judgment was entered in favor of defendants, a second suit was filed in federal court alleging essentially the same claims on behalf of essentially the same plaintiff class. The state court enjoined further prosecution of the federal court suit and subsequently adjudicated plaintiffs' counsel and several of the individual plaintiffs in contempt.

This Court vacated both the state court injunction and contempt judgments, squarely holding that "*state courts are completely without power to restrain federal court proceedings in in personam actions . . .*" 377 U.S. at 413 (emphasis added). The Court stated that plaintiffs in the second suit had a "right" to bring their action in federal

court, "a right which is theirs by reason of congressional enactments passed pursuant to congressional policy." *Id.* at 412. Although recognizing a long-settled exception for certain federal court suits in rem or quasi in rem, *ibid.*, the Court held that "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation . . . ." *Ibid.*, citing *Princess Lida v. Thompson*, *supra*, 305 U.S. at 466 (internal quotes omitted).

The anti-injunction rule of *Donovan* does not mean, of course, that federal claimants may always have their claims finally adjudicated in a federal court. Well-recognized doctrines, such as res judicata and collateral estoppel, establish that federal courts in many cases should refrain from deciding claims relating to proceedings in another court. What *Donovan* does mean, however, is that the decision whether to exercise federal jurisdiction is to be made by the federal courts in the first instance. Thus, the anti-injunction rule applies even when the second action is completely duplicative of the first, involving the exact same parties, claims, and defenses. As the Court in *Donovan* noted, the federal courts are fully capable of applying principles of res judicata and collateral estoppel to bar relitigation of claims and issues that have been finally decided in another forum. 377 U.S. at 412.

Similarly, the anti-injunction rule applies even though the second action may be characterized as "vexatious and harassing litigation," *General Atomic Co. v. Felter*, *supra*, 434 U.S. at 17, filed solely to thwart enforcement of the prior court's valid judgment. An injunction is barred in such cases not because they should be permitted to proceed, but because the federal district courts, once again, are competent to stop them where necessary or appropriate. As this Court stated in the *General Atomic* case, the "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment." 434 U.S. at 19.

The *Donovan* rule is thus predicated on the dual notions that federal courts are competent to decide whether to exercise their jurisdiction in a particular case and that they possess the devices necessary to effectuate those decisions. As stated, these include the finality doctrines of res judicata and collateral estoppel, as well as the inherent authority of the federal courts to prevent the abuse of their process. Similar devices, not explicitly mentioned in *Donovan*, are the various federal doctrines of abstention, *see, e.g., Hawks v. Hamill*, 288 U.S. 52 (1933), *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and principles of forum nonconveniens, *see, e.g., Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). These devices are adequate to mediate most conflicts between state and federal courts engaged in parallel or overlapping judicial proceedings. More importantly, they do so without resort to the extreme measure of an injunction against ongoing or prospective litigation.

The application of the *Donovan* rule to the instant case is clear. Petitioner's proposed federal suit is a purely in personam action seeking damages against nine individuals, one corporate defendant, and the state of Texas pursuant to an express waiver of sovereign immunity. Pet. App. C2, 3. Although the Alabama Supreme Court asserts that this action is an "inteference" with the Alabama State receivership proceeding and is "inextricably connected" to that proceeding, these findings provide no basis for the ousting of federal court jurisdiction. Whether or not petitioner may proceed with his federal claims in federal court is for the federal courts themselves to decide.

b. The In Rem Exception to the Holding in *Donovan v. City of Dallas* May Not Be Extended to Any Federal Action Causing "Interference" With or "Inextricably Connected With" a Prior State Action.

Although *Donovan* bars all injunctions against in personam suits in federal court, it also reaffirms a limited

exception to the anti-injunction rule for certain claims based on in rem jurisdiction. The decision below is an attempt to extend this exception to any suit, irrespective of its jurisdictional basis, that somehow threatens to "interfere" with a prior state court proceeding or is "inextricably connected" with such a proceeding. This radical extension of the in rem exception should not be permitted.[2]

At the outset, it is important to note that the in rem exception to *Donovan*'s anti-injunction rule has been narrowly construed. The exception applies only where *both* the state and federal court proceedings are in rem and jurisdiction in each court is founded on custody over the same res. *Princess Lida v. Thompson*, *supra*, 305 U.S. at 466.[3] It does not apply simply because one of the proceedings is in rem and the second suit, although in per-

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[2] At issue here in not whether petitioner's proposed federal court suit would be a proceeding in rem. It is clear beyond question that the federal proceeding would be based on jurisdiction over the defendants personally, not jurisdiction over corporate asset[illegible] other property taken from the custody of the Alabama receivership court. A case is in rem or quasi in rem only when (1) the basis for jurisdiction is the court's custody over property within its territory, and (2) the effect of any judgment in the plaintiff's favor would be limited to such property. *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). *See Restatement, Judgments*, 5-9. Petitioner's suit seeks money damages from each of the defendants. Pet. App. C12. Such a personal obligation, not limited to any res within the Texas federal court's control, is inherently in personam. *Shaffer v. Heitner*, *supra*, 433 U.S. at 199 & n. 17. Indeed, in the absence of the Alabama courts' injunction, petitioner's federal suit could proceed if the "property" in the possession of the Alabama receivership court did not exist at all.

[3] *Princess Lida v. Thompson*, *supra*, was such a case. There a federal district court purported to exercise in rem jurisdiction over trust assets which were the subject of a prior in rem proceeding in state court. This Court held that "if the two suits are in rem . . . so that the court, or its officers, has possession or must have control of the property which is the subject of the litigation . . . , the jurisdiction of the one court must yield to that of the other." 305 U.S. at 466.

sonam, is closely related to the in rem proceeding. Indeed, the in rem exception is inapplicable even where the second action seeks an adjudication of rights in the property on which the first court's in rem jurisdiction is based. *See United States v. Klein*, 303 U.S. 276 (1938); *Markham v. Allen*, 326 U.S. 490 (1946).

The reason for the in rem exception—and the reason it has been narrowly construed—derives from traditional, and somewhat metaphysical, notions about judicial power over property. The peculiar characteristic of jurisdiction in rem is that it is inherently *exclusive* jurisdiction that cannot be shared with another court. Although two courts may exercise concurrent jurisdiction over the same person in lawsuits based on in personam jurisdiction—that is, there is no jurisdictional bar to their doing so—two courts may *not* exercise simultaneous in rem jurisdiction over the same res. *Princess Lida v. Thompson*, *supra*, 305 U.S. at 466; *Mandeville v. Canterbury*, 318 U.S. 47 (1943); *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941); *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922).

This is so because property may "not be subject to two jurisdictions at the same time." *Hagen v. Lucas*, 10 Pet. (35 U.S.) 400, 403 (1836). *See also Pennsylvania Gen. Cas. Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935); *Harkin v. Brundage*, 276 U.S. 36 (1928). Jurisdiction over property is premised on a court's exclusive custody and control over such property. *Hagen v. Lucas*, *supra*. It follows that the assertion by one court of in rem jurisdiction has the effect of divesting all other courts of authority over the res. "If a court of competent jurisdiction, Federal or state, has . . . obtained jurisdiction over [a res], such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty." *Palmer v. State of Texas*, 212 U.S. 118, 125 (1909).

The exclusive nature of in rem jurisdiction makes the in rem exception necessary because, under this traditional view of judicial authority, there simply is no less disruptive way to mediate conflicts between state and federal courts asserting jurisdiction over the same property. As discussed earlier, conflicts between state and federal courts in suits in personam can be effectively mediated through the federal courts' application of principles of res judicata, federal abstention, and similar prudential doctrines of restraint. In the context of overlapping in rem proceedings, by contrast, the absence of concurrent jurisdiction in both the state and federal courts renders these same devices ineffective. Because the very pendency of an in rem case is thought to oust all other courts of jurisdiction, injunctions against judicial proceedings are viewed as the only way to prevent an intractable tug-of-war between the courts of two sovereigns.

The in rem exception thus responds narrowly to a problem that is unique to jurisdiction predicated on custody or control over property. It does not respond more generally to a concern about one court's "interference" with another court's proceedings. On the contrary, in personam actions subject to the *Donovan* rule may be highly disruptive of parallel in rem proceedings in state court. Indeed, in *Donovan* itself the subsequent federal action operated as a complete bar to enforcement of the state court's prior judgment and decree.[4] It is hard to conceive of a federal in personam suit that could cause greater "interference" with a related state proceeding. If the facts in *Donovan* did not warrant a broadening of

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[4] A state statute prohibited issuance of the contested revenue bonds so long as they were subject to litigation in any court. 377 U.S. at 409 & n. 3. Thus, the very commencement of the federal court in personam suit precluded enforcement of the state court's judgment in favor of the city.

the in rem exception, then the facts before the Alabama Supreme Court in this case certainly do not.

Moreover, more recent developments in the area of in rem jurisdiction suggest that, if anything, *Donovan*'s exception for in rem proceedings is too broad, not too narrow. In *Shaffer v. Heitner*, *supra*, this Court held that assertions of in rem and quasi in rem jurisdiction must satisfy the same due process standards of "minimum contacts" that have applied to jurisdiction in personam since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Recognizing that jurisdiction over property is, in reality, jurisdiction over the interests of *persons* in property, 433 U.S. at 207, the Court concluded that jurisdiction in rem and jurisdiction in personam are fundamentally the same.

This holding obviously draws into question the traditional view of jurisdiction over property as inherently exclusive jurisdiction, depriving all other courts of authority over the res. Since jurisdiction in rem is in substance jurisdiction over persons, it follows that, as in the case of in personam suits, two courts may indeed have concurrent in rem jurisdiction, thus obviating the need for injunctions against litigation in such cases. A functional analysis of the in rem exception of *Donovan* therefore counsels more in favor of limiting that exception, rather than extending it to all suits that, irrespective of their jurisdictional basis, threaten "interference" with another in rem proceeding.

Accordingly, there is no basis whatever for broadening the in rem exception to cover suits that are not strictly in rem. Where, as here, the federal court action is in personam, the availability of concurrent jurisdiction will enable the federal courts, in the first instance, to decide whether to proceed.

II. THE DECISION BELOW HAS IMPORTANT CONSEQUENCES BEYOND THE CIRCUMSTANCES OF PETITIONER'S CASE.

The decision below, purporting to divest federal courts of jurisdiction to decide in personam federal claims, has far-reaching consequences for the relations between state and federal courts and among courts of different states. Moreover, the extraordinary judicial power asserted in this case will cause substantial prejudice to the rights of persons, like petitioner, who are swept under the net of injunctions against judicial proceedings.

At the outset, it should be pointed out that petitioner's predicament is in no sense unique. In Texas alone, some fifty state-court receivership proceedings involving insurance companies have been instituted since 1970. Pet. App. E. Thirty-two of these cases, in addition to petitioner's, have resulted in permanent injunctions barring all litigation in other courts. *Ibid.* Many other states, through statutes regulating domestic and ancillary insurance companies, lay claim to the same broad injunctive authority. At least twenty-five states purport to empower their receivership courts to issue any injunctions or orders that are deemed necessary to "prevent interference" with the receivership proceeding, specifically including injunctions against the commencement or prosecution of "any actions." Pet. App. D.[8]

Moreover, the unfairness caused by these extravagant assertions of state judicial power can be severe. If the

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[8] Alabama's injunction statute, Alabama Code Tit. 27 § 27-32-5(b) (1977), is typical of these provisions. It states that "the court may, at any time during a proceeding under this chapter, issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the insurer or against its assets or any part thereof."

barred claim is one that the enjoining court may not adjudicate, the effect of the injunction is not merely to deprive the plaintiff of his choice of forum, but to deprive him of his claim altogether. This can happen in a number of ways.

First, the enjoined claim may be one over which Congress has given the federal courts exclusive jurisdiction. If the claimant is barred from suing in federal court and the enjoining state court is without jurisdiction to proceed, the federal cause of action is precluded. Indeed, this is precisely what has happened to petitioner in this case. His proposed federal complaint states claims under the Racketeering Influenced and Corrupt Organization Act, 18 U.S.C. § 1964, and the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, both of which vest exclusive jurisdiction in the federal district courts. 18 U.S.C. § 1964(a) and (c); 15 U.S.C. § 15. See *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n. 6 (1943) (Sherman Act). Under the receivership court's injunction, as affirmed by the Alabama Supreme Court, petitioner is deprived of a forum to prosecute these claims.

Second, the enjoined claim, whether state or federal, may arise as a counterclaim to a suit filed in another forum. If the enjoined claim is regarded as a "compulsory" counterclaim under Rule 13(a), Federal Rules of Civil Procedure, it is likely to be lost forever.[6] Any subsequent suit on the same cause of action will be barred

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[6] Rule 13(a) recognizes only two exceptions to the compulsory counterclaim rule, neither of which would seem to apply to preserve the claim of a party subject to an injunction against litigation. The first exception allows a defendant to forego a counterclaim if such claim "was the subject of another pending action." Rule 13(a)(1). The second exception applies where the district court has not obtained personal jurisdiction over the defendant. Rule 13(a)(2).

by principles of res judicata. *See American Mills Co. v. American Surety Co.*, 260 U.S. 360 (1922).[7]

Finally, the enjoined claim may be one over which the enjoining state court has subject matter jurisdiction, but not personal jurisdiction. Because the enjoined party is barred from suing in another court having such jurisdiction, the effect of the injunction is to work a forfeiture of an otherwise valid cause of action.

Apart from these extreme consequences of injunctions against proceedings in other courts, there is the additional unfairness of depriving a plaintiff of his right to choose a federal forum, a "right that . . . was granted by Congress and cannot be taken away by the State." *Donovan v. City of Dallas, supra*, 377 U.S. at 413. Although this right is not absolute, neither should it be overridden without substantial justification. We note that federal bankruptcy courts, whose functions are similar to those of a state receivership court,[8] do not purport to have the sweeping injunctive powers asserted by the Alabama Supreme Court. The stay provisions of the Bankruptcy Act, although permitting the stay of certain judicial proceedings, 11 U.S.C. 362(a)(1)-(8), strictly limit this injunctive authority to creditors' claims *against* the bankrupt. They do not purport to authorize the stay of

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[7] It is worth noting that injunctions, like the one at issue here, do not typically inhibit suits *against* litigants like petitioner. The fact that they may be sued elsewhere, but are forced to forego all counterclaims, obviously puts them at a severe disadvantage.

[8] Receivership proceedings involving insurance companies take place in state court, rather than in federal bankruptcy court, because of the prohibition against federal regulation of insurance companies contained in the McCarran-Ferguson Act, 15 U.S.C. 101 *et seq.* The federal Bankruptcy Act, as amended, contains an express exclusion for domestic insurance companies. 11 U.S.C. 109(b)(2).

lawsuits, such as petitioner's, that are brought against parties other than the insolvent corporation.[9]

Finally, the injunction against federal court litigation is particularly offensive in this case because the Alabama receivership court—the court to which petitioner is forced to bring his claim—is itself the subject of allegations in petitioner's complaint. Pet. App. C ¶¶ 21, 38, 39, 42. Whatever the merits of these allegations, it is apparent that the Alabama receivership court is not the appropriate forum for their adjudication. Petitioner, in other words, is not only denied his choice of forum by the decision below, but he is forced to litigate his claims in the one forum that is, under the circumstances, the least hospitable of all conceivable choices. Amicus submits that the injunction against petitioner therefore constitutes a serious abuse of state judicial power.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: November 27, 1982

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[9] *See, e.g., Ideal Roofing & Sheet Metal Works Inc.*, 9 B.R. 2 (Fla. 1980) (denying stay against state court suit filed by the bankrupt); *In re Cloud No. 9, Ltd.*, 3 B.R. 202 (N.M. 1980) (denying stay of creditor suit against nonbankrupt third party).

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and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF TEXAS INSTITUTE OF GOVERNMENT IN SUPPORT OF PETITIONER

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MOTION OF TEXAS INSTITUTE OF GOVERNMENT FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the rules of this Court, Texas Institute of Government respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

Counsel for petitioner has consented to the filing of this *amicus* brief, and his letter of consent is being filed with the Clerk. Counsel for respondents have refused consent.

Texas Institute of Government is a charitable and educational organization incorporated in Texas. As reflected in its Articles of Incorporation, its purposes include research and analysis of public policy questions per-

taining to improving the administration of state and local government in Texas and the education of the general public thereto. *Amicus* is vitally concerned with the proper functioning of governmental agencies in Texas, including the Texas State Board of Insurance, and with maintaining an appropriate balance between the interests of such agencies and the rights of individual citizens.

The issue raised by the petition is of particular concern to *amicus* because from 1970 to the present Texas courts have issued 33 injunctions similar to the injunction issued below (Petition, E-1), and because the injunction below prevents petitioner from filing a complaint in a federal district court in Texas. Petition at 3.

Amicus is aware that, absent consent of all parties, the filing of an *amicus* brief at this stage is not favored. Accordingly, we are requesting leave to file the annexed brief only because we believe the judgment below threatens an exceptionally important individual liberty—the right of a citizen to petition a federal court to enforce federally created rights without first having to persuade a state court to authorize the petition—and because we believe there are substantial reasons, in addition to the reasons advanced in the petition, why the Court should grant review.

For example, *amicus* will urge that the injunction below, and the Alabama statute authorizing it, are void under the Supremacy Clause, and are inconsistent with decisions of this Court construing the Supremacy Clause, insofar as they totally preclude petitioner from litigating federal causes of action for which Congress has created exclusive jurisdiction in the federal courts.

Amicus will urge that the judgment below conflicts with *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), and other decisions in which this Court has held that state courts cannot directly or indirectly enjoin federal officials from performing federal functions.

And *amicus* will urge that the judgment below conflicts with decisions by this Court establishing that a state bears the burden of justifying limitations on First Amendment liberties by establishing the existence of a compelling or substantial state interest and showing that no less drastic alternatives would satisfy that interest. As *amicus* will demonstrate, the court below failed to apply correct First Amendment analysis and improperly placed on petitioner the burden of justifying his exercise of fundamental First Amendment rights.

These and other arguments contained in the annexed *amicus* brief have not been fully addressed by petitioner.

In order to present these additional arguments, Texas Institute of Government respectfully moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE TEXAS INSTITUTE OF GOVERNMENT IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE TEXAS INSTITUTE OF GOVERNMENT

The interest of *amicus curiae* appears in the foregoing motion.

INTRODUCTION

Amicus is taking the unusual step of filing a brief at this stage in order to indicate to the Ccurt our belief that the judgment below raises important and unsettled

issues of constitutional law and threatens the fundamental right of citizens to petition the federal courts for redress of grievances. This petition squarely presents the question whether a state court with jurisdiction over a receivership can enjoin a citizen from filing in federal court a complaint which is purely *in personam* in nature and which includes causes of action which Congress has placed in the *exclusive* jurisdiction of the federal courts. *Amicus* believes the Court should grant the petition to review this important question.[1]

In 1975, acting pursuant to the extremely broad provisions of Alabama Code, Title 20, § 27-32-5(b),[2] previously Alabama Code, Title 28A, § 624, an Alabama court

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[1] The proceedings below could fairly be understood as challenging the constitutionality not only of the state court injunction, but also of the state statute authorizing that injunction, as applied to the facts of this case. Viewed in that way, petitioner would be entitled to *appeal*, rather than simply seek *certiorari*, because the Alabama Supreme Court upheld the validity of the statute despite the argument that, as applied to enjoin *in personam* actions, the statute was repugnant to the federal Constitution. *See* 28 U.S.C. § 1257(2); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971). Although petitioner has chosen not to appeal, the fact that the issue could probably have been raised by appeal rather than by petition for writ of *certiorari* indicates that the issue is of a type considered appropriate by Congress for the obligatory jurisdiction of this Court, and suggests another reason why the Court should exercise its discretion to grant the petition.

[2] Petition, D-1:

> (b) The court may, at any time during a proceeding under this chapter, issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the insurer or against its assets or any part thereof.

issued an even broader injunction,[3] which prohibited petitioner from filing "any lawsuit" in "any court" against John G. Bookout (not only as Receiver of Empire Life Insurance Company of America, but also "as an in-

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[3] It is ORDERED, ADJUDGED AND DECREED THAT

(1) any and all policy holders, stockholders and agents, present or former, of Empire Life Insurance Company of America, and

(2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A.R. Schwartz, and Thomas R. Beech), and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court whatsoever located on behalf of any party whatsoever against:

(1) John G. Bookout, as an individual;

(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

(3 the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

(5) any other person or legal entity which lawsuit or claim relates to or affects directly or indirectly:

(a) the affairs of Empire Life Insurance Company of America;

(b) its receivership;

(c) its Receiver;

(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

(e) the implementation of any order or decree of this Court in this proceeding, unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court.

dividual") or against "any other person," provided that the lawsuit related to "or affects" directly "or indirectly" either the receivership, or more generally, "the affairs of Empire Life," without the prior approval of that court.[4]

Petitioner sought approval to file a purely *in personam* action in federal court. He specifically alleged that the "proposed action for damages will in no way interfere, delay or stop the Empire Life receivership proceedings." Petition, A-1. Apparently, that allegation was never formally denied, but the court nevertheless refused permission to file the proposed complaint because petitioner "offered no testimony or other evidence tending to show" that his allegation was true, because the litigation would "not involve the Empire receivership proceedings," and because "Moody has failed to carry the burden of proving that the relief sought by the pending motion should be granted . . . ." Petition, B-2.

The Alabama Supreme Court affirmed, again on the ground that petitioner had "failed to offer any evidence that the proposed action in the United States District Court did not involve the Empire Life receivership proceedings." Petition, A-2.

SUMMARY OF ARGUMENT

This case raises a novel constitutional question not previously considered by this Court: whether a state court injunction prohibiting a litigant from asserting in federal court claims within the exclusive jurisdiction of the federal courts frustrates congressional policies and violates the Supremacy Clause. *Amicus* believes that the congressional determination to vest in federal courts ex-

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[4] Since the proviso clause literally modifies only paragraph (5) of the injunction, it appears that the injunction prohibits suit against Bookout "as an individual" even if the suit does not even arguably affect the receivership or the affairs of Empire, even indirectly.

clusive jurisdiction over claims arising under the Sherman Act and the Organized Crime Control Act is a determination that federal courts will occupy the field with respect to those federal claims and that injunctions such as the one issued by the Alabama courts in the present case, which bar citizens from asserting those federal claims in any court, violate the Supremacy Clause. Point I.A.

Petitioner also believes that the judgment below is inconsistent with *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976), and other decisions of this Court holding that state laws or injunctions which impinge upon federally created rights must be narrowly drawn or they will violate the Supremacy Clause. Point I.B.

In our view, the judgment below is inconsistent with *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1892), and other decisions of this Court holding that state courts cannot directly or indirectly enjoin federal officials from performing federal functions. Federal courts clearly have jurisdiction to determine whether they have or should exercise jurisdiction, and making that determination is a function federal judges necessarily perform. Here, however, the judgment below strips federal courts of the authority to determine their own jurisdiction. Point II.

Finally, *amicus* believes the judgment below is in several respects directly inconsistent with prior decisions of this Court construing the Petition Clause of the First Amendment. The Court has ruled that the "right of access to the courts is . . . one aspect of the right of petition." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 405, 410 (1972). The right to petition, like other First Amendment rights, can be abridged (or, as in this case, totally extinguished) only if the *state* bears the burden of showing that the abridgment is necessary to protect an important or compelling state interest and is the least drastic alternative that can be

used to protect that state interest. *Larson* v. *Valenti*, 102 S.Ct. 1673, 1685 (1982); *Widmar* v. *Vincent*, 102 S.Ct. 269, 274 (1981); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Thornhill* v. *Alabama*, 310 U.S. 88, 98 (1940).

Here, however, the Alabama courts placed on *petitioner* the burden of showing why he should be permitted to exercise his First Amendment right to petition, and they failed to require the state to demonstrate that no less drastic alternative than total extinguishment of his right to petition would suffice to protect the state's interests.

There were several alternatives that would appear adequate to protect the state's interest in prohibiting undue interference with a state receivership proceeding. The state could have relied on the discretion of the federal court either to decline to exercise jurisdiction or to deny any relief that would unduly interfere with the receivership proceedings. The state could have tailored its rather sweeping injunction more narrowly, or it could perhaps have required petitioner to delete certain claims or allegations from his proposed complaint, allowing the others to proceed. Finally, instead of a prior restraint on the right to petition, the state could have relied on the deterrent effect of its ability to punish petitioner for contempt if his actions actually did interfere with the receivership. In these and other ways the judgment below is directly inconsistent with prior decisions of this Court and utterly destroys one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967). Point III.

In *amicus'* view, the judgment below is so clearly inconsistent with prior decisions of this Court that the Court should not only grant review, but should summarily reverse.

ARGUMENT

I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION UNDER THE SUPREMACY CLAUSE AND IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT CONSTRUING THAT CLAUSE.

The Supremacy Clause, Art. VI, § 2 of the Constitution, provides that the "Laws of the United States" "shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[6] The touchstone of Supremacy Clause analysis, when a state action is alleged to conflict with a federal statute, is congressional intent. *Retail Clerks International Association* v. *Schermerhorn*, 387 U.S. 96, 103 (1963). Where Congress has not explicitly stated its intent to preempt state law, this Court will invalidate a state law if it "conflicts with federal law or would frustrate the federal scheme" or if the Court "discern[s] from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone* v. *White Motors Corp.*, 435 U.S. 497, 504 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

A. The Judgment Below Raises a Novel and Important Question Under the Supremacy Clause That Has Not Previously Been Considered by This Court.

This case presents an important and novel constitutional question: whether a state court violates the Supremacy Clause when it issues an injunction prohibiting a litigant from filing claims within the *exclusive* jurisdiction of the federal courts. Petitioner's proposed complaint alleged violations of two federal statutes—the Organized Crime Control Act of 1970, 18 U.S.C. § 1961,

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[6] Petitioner also relies on Supremacy Clause arguments. *See* Petition at 2, 12, 16. Accordingly, the arguments raised in this *amicus* brief are properly before the Court.

and the Sherman Act, 15 U.S.C. § 4—as to which Congress has vested jurisdiction in the federal courts to the exclusion of the state courts.[6] The congressional determination to depart from the ordinary practice of giving federal and state courts concurrent jurisdiction over federal causes of action reflects the important federal policies underlying those statutes.

It would clearly frustrate those policies and violate the Supremacy Clause if a state court assumed jurisdiction over a Sherman Act or Organized Crime Control Act case notwithstanding the congressional determination to vest exclusive jurisdiction in the federal courts. It would equally frustrate congressional policies if a state court were permitted to *prevent* litigants from bringing their Sherman Act or Organized Crime Control Act claims in *federal* court.[7] States may not, without contravening the Supremacy Clause, "burden access to the federal courts" in violation of congressional policies. *Ehlers* v. *City of Decatur*, 614 F.2d 54 (5th Cir. 1980).[8]

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[6] *See* authorities cited in Petition at 19 note 34. Petitioner sought to raise other federal claims over which the state courts would have concurrent jurisdiction. The Supremacy Clause argument advanced here might apply also to the state court injunction forbidding petitioner from litigating those non-exclusive federal claims. But for simplicity of analysis we will discuss the Supremacy Clause only as it applies to the injunction against filing federal claims over which the federal courts have exclusive jurisdiction. If the injunction violates the Supremacy Clause in that regard, as we contend, the decision below would have to be vacated, and the state courts could then consider the applicability of the Supremacy Clause to the non-exclusive federal claims.

[7] Several decisions of this Court have suggested that where federal rights are involved, state courts are under a constitutional duty to vindicate them. *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908); *Testa* v. *Katt*, 330 U.S. 386 (1947). Similarly, where federal rights are involved, state courts may be under a constitutional duty not to *frustrate* their vindication by federal courts.

[8] The frustration of congressional policies is at least as evident here as it was in *Toll* v. *Moreno*, 102 S. Ct. 2977 (1982), this Court's

Moreover, a congressional determination to vest exclusive jurisdiction in federal courts over particular causes of action is tantamount to a determination that federal courts would occupy the field as to those causes of action. Congress obviously intended that only federal courts would decide whether to allow Sherman Act or Organized Crime Control Act actions to proceed. At the least, the decision below raises a constitutional issue of sufficient magnitude and importance to warrant this Court granting the petition for a writ of *certiorari*.[9]

B. The Judgment Below Is Inconsistent with Prior Decisions of this Court Construing the Supremacy Clause.

In addition, state laws or injunctions which impinge upon federally created rights must be narrowly and precisely drawn or they will violate the Supremacy Clause. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 605 (1976). The Alabama statute is extremely broad,[10] and the Alabama courts made no effort to narrow the injunction or to permit petitioner to assert some claims or allegations, but not others. The judgment below is therefore inconsistent with *Examining Board* and other decisions of this Court construing the Supremacy Clause.

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most recent decision striking down a state action on Supremacy Clause grounds. *Toll* was a challenge by holders of nonimmigrant alien visas to a decision by the University of Maryland to deny them in-state status and tuition benefits. Even though the state's action did not directly conflict with any federal statute or regulation, the Court held that it violated the Supremacy Clause because it burdened or frustrated federal policies.

[9] As Appendices D and E to the Petition indicate, several states have statutes similar to Alabama's, and injunctions similar to the injunction below are quite common.

[10] *See* note 2, *supra*.

II. THE JUDGMENT BELOW IS INCONSISTENT WITH TARBLE'S CASE AND OTHER DECISIONS OF THIS COURT HOLDING THAT STATE COURTS CANNOT DIRECTLY OR INDIRECTLY ENJOIN FEDERAL OFFICIALS FROM PERFORMING FEDERAL FUNCTIONS.

It is clear—again, under the Supremacy Clause—that an Alabama court could not directly enjoin a federal court from deciding whether that federal court had, or should exercise, jurisdiction over asserted federal causes of action. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); *McClung* v. *Selliman*, 19 U.S. (6 Wheat.) 598 (1821); *Ex parte Schockley*, 17 F.2d 133 (N.D. Ohio 1926); *Armand Schwall, Inc.* v. *Federal Reserve Bank*, 286 N.Y. 503, 37 N.E.2d 225 (1941). And it is clear from *Donovan* v. *City of Dallas*, 377 U.S. 408, 413 (1964) that there is no difference between an injunction forbidding a *party* from filing a federal complaint and a direct restraint on the federal judiciary: "it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself." [11] In both cases the federal court is precluded from deciding for itself whether it has or should exercise jurisdiction.

Federal courts have exclusive authority to determine their own jurisdiction and they have always reserved for themselves the power to decide whether they have or should exercise jurisdiction.[12] To allow states to determine whether federal courts have or should exercise jurisdiction, particularly over federal causes of action

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[11] It is also clear from *General Atomic Co.* v. *Felter*, 434 U.S. 12, 17 (1977), that "the rights conferred by Congress to bring in personam actions in federal courts are not subject to abridgment by state court injunctions, regardless of whether the federal litigation is pending or prospective."

[12] *E.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *United States* v. *United Mine Workers*, 330 U.S. 258, 292-293 (1947).

for which federal courts have been given exclusive jurisdiction, would effectively limit federal judges to considering only those issues which states would permit them to consider. This would appear to be a clear violation of *Tarble's Case* and the principles of federal supremacy on which that case is based. At the least, this Court should grant the petition in order to address the applicability of *Tarble's Case* to the actions of the Alabama courts.

III. THE JUDGMENT IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT WHICH TOGETHER PROVIDE THAT THE RIGHT TO PETITION A FEDERAL COURT IS A FIRST AMENDMENT RIGHT WHICH THE STATE CAN TOTALLY ABRIDGE ONLY IF IT BEARS THE BURDENS OF JUSTIFYING THE ABRIDGMENT AND OF SHOWING THERE ARE NO LESS DRASTIC ALTERNATIVES.

We start with the proposition that the right to petition the courts for redress of grievances is an ancient and fundamental right that is protected by the First Amendment. The right to petition can be traced at least to the 13th Century. The Magna Carta, or "Great Charter of Liberties," resulted from a petition feudal barons presented to King John in 1215;[13] and the right almost certainly existed even before Magna Carta.[14] The practice

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[13] *See* W. McKechnie, *Magna Carta* 38 (1914). *See also* O. Holt, *The Making of Magna Carta* (1965); A. Pallister, *Magna Carta—The Heritage of Liberty* (1971); *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 1031 (1973); W. Stubbs, *The Constitutional History of England* 413 (J. Cornford ed. 1979) (tracing right to petition to the articles of the barons in 1215 and other precedents from 1258, 1301, 1309, and 1310).

[14] One commentator states that "[t]he right of every subject to petition the sovereign *had always existed*." A. White, *The Making of the English Constitution* (2d ed. 1925) (emphasis added). Another authority states that "[t]he right of petitioning the crown

of petitioning the government for redress of grievances became institutionalized with the development of parliament in the 13th Century. Some of those petitions were private individual requests which were handled by proceedings of a judicial nature.[15] Thus, even at this very early stage of constitutional development, the right to obtain redress of grievances through judicial proceedings was viewed as fundamental.[16]

This Court has recognized that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967). *Cf.*

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and parliament was one of the most valuable possessed by the subject, and seems to have been exercised from the earliest times." F. Plucknett, *Taswell-Langmead's English Constitutional History* 669 (11th ed. 1960). The earliest recorded petition may have been in 1013, when London fell to the Danes and Aethelred II (also known as "the Unready") fled to France. The English leaders, according to the *Anglo-Saxon Chronicle*, sent him a Remonstrance listing grievances and summoning him to appear before the witan. He sent his son Edward with a written message that he "would remedy each one of the things which they all abhorred, and everything should be forgiven that had been done or said against him, on condition that they all unanimously and without treachery return to their allegiance." This brief message, responding to a petition for redress of grievances, may be the first recorded document of liberty in English history. *See* Marsh, *Documents of Liberty* 13-14 (1971).

[15] *See* W. Stubbs, *supra* n.13, at 413. British constitutional practice did not distinguish petitions of a judicial, executive, or legislative nature. This early history makes clear that litigants appearing in court are exercising their right of petition no less than individuals communicating on matters of public business with the executive or legislative branches.

[16] It is noteworthy that the right of petition evolved separately from the more general right of speech. Indeed, the right of petition was firmly established at least four hundred years before the right of speech received recognition. *See generally* L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* 88-125 (1960).

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). It is a basic attribute and privilege of national citizenship. *In re Quarles*, 158 U.S. 532, 535 (1895); *United States* v. *Cruikshank*, 92 U.S. (2 Otto) 452 (1876). And, as this Court stated in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 405, 410 (1972), the "right of access to the courts is . . . one aspect of the right of petition." Thus, petitioner, in seeking to file his complaint in federal court, was without doubt attempting to exercise his basic First Amendment right to petition.

Both state and federal courts are required to apply "exacting scrutiny" to state actions challenged as abridging fundamental First Amendment rights, such as the right to petition, the right to speak, and the right to exercise one's religion. *Citizens Against Rent Control* v. *City of Berkeley*, 102 S.Ct. 434, 440 (1981); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) (per curiam). If the state action is found to burden First Amendment rights, it will be upheld only if it is justified by a sufficiently important governmental interest and only if it is narrowly tailored to further that interest. *Larson* v. *Valenti*, 102 S.Ct. 1673, 1685 (1982); *Widmar* v. *Vincent*, 102 S.Ct. 269, 274 (1981); *First National Bank of Boston* v. *Bellotti*, *supra*. Furthermore, the *state* bears the burden of demonstrating that its interest is sufficiently important and that the means it has chosen are the least restrictive of First Amendment liberties. *See Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Talley* v. *California*, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring); *Thornhill* v. *Alabama*, 310 U.S. 88, 98 (1940). The decision below represents a particularly egregious failure to heed the constitutional principles articulated by this Court in these and other cases.

A. The Court Below Failed to Insist That the Restriction on Petitioner's First Amendment Rights Be Justified by a Sufficiently Important State Interest.

As *amicus* has argued above, petitioner's attempt to petition the federal courts for the redress of grievances involved the exercise of a fundamental constitutional right entitled to a high degree of protection under the First Amendment. *Amicus* believes that only a compelling state interest can justify abridging petitioner's right to petition. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Cf. Douglas* v. *California*, 372 U.S. 353 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). This is especially true where, as here, the state action is a *total prohibition* of the exercise of a First Amendment right, rather than a regulation that merely limits the individual's freedom of action. *Cf. Schad* v. *Borough of Mount Ephraim*, 101 S.Ct. 2176, 2186 (1981). But even if the state interest need not be compelling, the state must *at least* demonstrate the existence of an important interest and must show that the abridgment is necessary to achieve that interest.

In the present case, the decision below was evidently grounded in Alabama's interest in preserving the integrity of insurance company receivership proceedings. *Amicus* does not dispute that a state court's interest in preserving jurisdiction over the subject matter of an action *in rem* may sometimes authorize prohibition of *in rem* actions in other jurisdictions that would disrupt the state's judicial processes. *See Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U.S. 456 (1939). That interest is limited in scope, however, and is not sufficient to justify a prohibition of *in personam* actions that have, at most, a tangential impact on the state's judicial processes. *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964); *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978). In the present case, petitioner sought only to initiate a purely

in personam action in federal court that would not have significantly disrupted the state proceedings. Accordingly, the state interest on which the court below apparently relied was not sufficiently compelling or important to justify the serious intrusion on petitioner's First Amendment rights authorized by the injunction.

B. The Court Below Failed To Insist that the Restriction on Petitioner's First Amendment Rights Be the Least Restrictive Means Necessary to Protect the State's Interest.

The decision of the court below failed even to consider whether the interests which the state sought to advance by its injunction could be satisfied by a means less restrictive of First Amendment freedoms. The decision therefore conflicts with prior decisions of this Court holding that state regulation of protected First Amendment interests must be narrowly drawn and that the state must use the least restrictive means that will protect its interests. *E.g., Schad* v. *Borough of Mount Ephraim, supra*, at 2183; *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

Several alternatives appear to be adequate to protect the state's interests in the present case. For example, the state could rely on the federal district court, acting on its own motion, or at the request of the defendants or the state, to defer ruling on the federal complaint or to refrain from authorizing any relief that would in any way interfere with the receivership proceedings.[17] Or instead of a global injunction, as here, the state could narrow the scope of the injunction or could perhaps pro-

[17] Petitioner did not and does not assert that the federal court would have been required to consider or decide his federal complaint on the merits. He asserts only that the federal court should have been given the opportunity to decide for itself whether to consider the merits.

hibit petitioner from filing the proposed complaint unless petitioner amended the complaint to delete particular claims or allegations which in the state's view would interfere with the receivership.

As another alternative, the state could rely on the deterrent effect of its ability, *after* actual interference with the receivership, to punish petitioner for contempt. Indeed, the same considerations which preclude prior restraint of First Amendment rights, while authorizing subsequent criminal punishment,[18] would preclude a total prior restraint of petitioner's right to petition, particularly where, as here, a subsequent punishment is available to the state.

C. The Court Below Improperly Placed the Burden of Justification on Petitioner, Rather than on the State.

Perhaps the most fundamental error of the decision below is its evident insistence that the *petitioner* bear the burden of justifying the exercise of his First Amendment right to initiate litigation in federal court.[19] As *amicus* has shown, it is the *state*, rather than the individual whose rights are abridged, that must justify its action by demonstrating the existence of a sufficiently important governmental interest and the lack of less restrictive means to satisfy that interest. *E.g.*, *Linmark Associates, Inc.* v. *Township of Willingboro*, *supra*; *Talley* v. *California*, *supra*. The decision below, by failing to require this showing by the state, conflicts with prior decisions of this Court, and constitutes clear error of constitutional dimension.

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[18] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976). *See also Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1968).

[19] Alabama Supreme Court Judgment and Opinion (Petition, A-2); Circuit Court Order and Decree (Petition, B-2).

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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MOTION FILED
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No. 82-740

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,
v.

STATE OF ALABAMA EX REL.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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WILSON - EYES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation hereby moves this Court pursuant to Supreme Court Rules 36 and 42, for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari in the above-captioned proceeding. Consent to the filing of this brief has been granted by counsel for petitioner. Counsel for respondent Protective Life Insurance Company has been contacted and has withheld consent.

The Washington Legal Foundation (WLF) is a national non-profit public interest law center that engages

in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law involving the rights of citizens and businesses. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in cases such as *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); and *Federal Trade Commission v. Standard Oil Co. of California*, 100 S. Ct. 62 (1980). More significantly, WLF filed, and this Court accepted over opposition, a brief *amicus curiae* in support of the petition for writ of certiorari in *Moody v. Forresster*, No. 80-1235 (U.S. filed Feb. 20, 1981), *cert. denied*, 101 S. Ct. 1733 (1981), a case related to the instant one.

WLF believes that it is in the public interest to assure that all citizens have meaningful access to federal and state courts to vindicate their rights and that federal and state courts respect the authority of each other. WLF submits that the Alabama Supreme Court's decision which denies petitioner his day in federal court clearly violates this Court's rule in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), and denies petitioner his First Amendment rights as well as his underlying economic rights protected under the Fifth and Fourteenth Amendments. Such a result is contrary to the public interest and would set a dangerous precedent in this area by allowing state

courts to close the doors of the federal courts not only on petitioner, but also on hundreds of other individuals, businesses, and corporations that may seek to vindicate their rights in this and other areas.

Accordingly, the Washington Legal Foundation respectfully requests that it be permitted to participate as *amicus curiae* in this matter.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-740

SHEARN MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA EX REL.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF) is a national non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regu-

lations and constitutional law involving the rights of citizens and businesses. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in cases such as *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); and *Federal Trade Commission v. Standard Oil Co. of California*, 100 S. Ct. 62 (1980). More significantly, WLF filed, and this Court accepted over opposition, a brief *amicus curiae* in support of the petition for writ of certiorari in *Moody v. Forresster*, No. 80-1235 (U.S. filed Feb. 20, 1981), *cert. denied*, 101 S. Ct. 1733 (1981), a case related to the instant one.

WLF believes that it is in the public interest to assure that all citizens have meaningful access to federal and state courts to vindicate their rights and that federal and state courts respect the authority of each other. WLF submits that the Alabama Supreme Court's decision which denies petitioner his day in federal court clearly violates this Court's rule in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), and denies petitioner his First Amendment rights as well as his underlying economic rights protected under the Fifth and Fourteenth Amendments. Such a result is contrary to the public interest and would set a dangerous precedent in this area by allowing State courts to close the doors of the federal courts not only on petitioner, but also on hundreds of other individuals, businesses, and corporations that seek to vindicate their rights in this and other areas.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the Statement of the Case contained in the Petition for Writ of Certiorari at 2-8.

REASONS FOR GRANTING THE WRIT

I. THE ALABAMA SUPREME COURT HAS UNCONSTITUTIONALLY PREVENTED PETITIONER FROM FILING AN *IN PERSONAM* ACTION IN FEDERAL COURT.

A. A State Court Cannot Enjoin An *In Personam* Action In Federal Court Which Will Not Divest The State Court of Control or Jurisdiction Over the *Res*.

This Court has carefully developed a body of law over the years designed to resolve the conflict of jurisdiction exercised by state and federal courts. *Amicus* submits that the Alabama Supreme Court has violated these constitutional principles by denying petitioner his right to file the proposed *in personam* complaint for money damages in federal court.

As explained by this Court in *Donovan v. City of Dallas*, 377 U.S. 408 (1964):

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson*, 305 U.S. 456, 465-468.

Id. at 412 (footnote omitted).

In no case, however, may a state court enjoin an *in personam* action brought in federal court simply because the issues raised in the complaint may relate to or involve certain facts and circumstances arising out of the state court *in rem* proceeding. As the *Donovan* Court reiterated, "the old and well-established judicially declared rule [is] that state courts are *completely without power* to restrain federal court proceedings in *in personam* actions. . . ." *Id.* at 412-413 (emphasis added) (footnote omitted). *See Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979); 1A, Pt 2 Moore's Federal Practice ¶ 0.222. The *Donovan* Court's phrase "completely without power" could not be stated any clearer. The Alabama court not only ignored this rule in its decision, but also misapplied the narrow exception to it as well.

Attempts by lower courts to expand upon this narrow exception to the noninterference rule have been met with sharp disapproval by this Court. *See, e.g., General Atomic Co. v. Felter*, 434 U.S. 12 (1977). Other courts have had no difficulty in properly following the *Donovan* principle. For example, in *Weisfeld v. Spartans Industry, Inc.*, 58 F.R.D. 570 (1972), a federal suit alleging violations of federal securities laws, the district court stated:

> Defendants argue that plaintiff is in violation of the state court's January 27, 1971, order enjoining any further actions by Spartans' shareholders *arising out of* the transactions or occurrences complained of in the state court consolidated suit. It is well settled, however, that a state court cannot enjoin a person from prosecuting an action in a federal court which has jurisdiction over the parties and subject matter. *Donovan v. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964).

Id. at 577 (emphasis added).

Accordingly, the Supreme Court of Alabama should not be permitted to broaden the scope of the *Donovan* excep-

tion by enjoining a lawsuit which is clearly *in personam*. The fact that all or part of the proposed litigation may *arise out of* or *relate to* events surrounding the receivership proceeding does not mean that petitioner can be barred from litigating those residual or related claims in federal court.

This Court has recently dealt with analogous issues such as the ones presented here, although in a different context. In *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, —— U.S. ——, 102 S.Ct. 1357 (1982), this Court granted certiorari and reversed a North Carolina court for failing to give full faith and credit under Article IV to an Indiana judgment concerning a deposit made by the insurer for the benefit of policyholders. In his concurring opinion, Justice White noted the distinction between proceedings *in personam* and those affecting the *res* when he stated:

> The Court adopted a two-fold distinction between control over claims and over assets:
>
> "In so far as [a court order] determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. [This] function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. . . . There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*."

Id. at 1372, *quoting Riehle v. Margolies*, 279 U.S. 218 224 (1929).

Amicus submits that in the instant case, there is similarly a clear distinction between petitioner's *in personam* claim and those that deal directly with the *res*. As in *Underwriters*, there is no inherent reason why the adjudication of petitioner's *in personam* claim may not be

had in some court other than that which has control of the *res*. *See also Purcell v. Summers*, 126 F.2d 390, 395 (4th Cir.), *cert. denied*, 317 U.S. 640 (1942); *Watson v. Jones*, 13 Wall. 679, 720 (1872).

B. The Proposed Complaint Is An *In Personam* Action Which Will Not Deprive The State Court of Jurisdiction Over the Res.

An examination of petitioner's proposed complaint (Pet. for Cert., App. C) indicates that it is one only for substantial money damages under various federal antitrust, anti-racketeering, and civil rights statutes and the common law of Alabama and Texas against certain named individuals. Clearly, the complaint is an *in personam* action. In the Alabama Supreme Court, respondents argued at length, and will no doubt argue here, that many of petitioner's claims set forth in his complaint may be defended or opposed on principles of res judicata and collateral estoppel. Those arguments are, of course, wholly irrelevant to the issue at hand of whether or not the proposed action is *in personam*. The named defendants will have ample opportunity to raise and test the merits of those and any other defenses they may have in federal court *after* the complaint is filed. *See* Fed. R. Civ. P. 8(b), (c).

By focusing on these non-issues and engaging in *ad hominem* arguments, the respondents attempt to obfuscate the only relevant issue before this Court: will the filing of the proposed complaint seeking only money damages in federal court deprive the state court of jurisdiction over the *res* in the Empire Life Insurance receivership proceeding? *Amicus* submits that the only answer to this question is "no."

Significantly, the Alabama Supreme Court never found that petitioner's proposed complaint was not an *in personam* action. *See* Pet. for Cert., App. A. The Alabama

Court merely concluded that the proposed complaint is "inextricably connected with" and would be an "interference with" the receivership proceedings. *Id.* But as already demonstrated, *supra*, the test under *Donovan* is whether the federal complaint is an action *in rem* or *quasi in rem*, that is, will it wrest control over the *res* from the state court. There can be no doubt that the proposed complaint will *not* defeat the state court's jurisdiction over the *res*, and not surprisingly, the Alabama court was unable to find to the contrary.

If the Alabama Court's "connected with" and "interference with" test is allowed to stand, it would not only be a clear departure from the narrow rule in *Donovan*, but would raise other substantial constitutional issues as *amicus* argues, *infra*.

Amicus submits that a federal court is quite capable of preventing any abuse of the judicial process and would be able to monitor the extent, if any, such a federal suit would have on the state court receivership proceedings, which from all appearances, is effectively completed anyway. Furthermore, it is essential to permit the filing of petitioner's complaint as soon as possible lest any right he has be subject to defeat by affirmative demands such as the statute of limitations. Once the complaint is filed, the respondents could ask the federal court to stay the federal proceedings until the final completion of the receivership proceeding if undue interference with the receivership can be shown by the respondent.

For all these reasons, *amicus* submits that the Alabama Supreme Court violated the constitutional principles enunciated by this Court in *Donovan* and its progeny by prohibiting petitioner from filing his *in personam* complaint in federal court.

II. THE ALABAMA SUPREME COURT DECISION VIOLATES THE CONSTITUTIONAL RIGHTS OF PETITIONER AND IMPERMISSIBLY PLACES THE BURDEN ON HIM TO PROVE THAT HIS CLAIM DOES NOT VIOLATE A VAGUE AND OVERBROAD STANDARD.

Article III of the United States Constitution and various federal statutes guarantee citizens of the United States access to the federal courts. *See* 28 U.S.C. § 1251. The Framers recognized that citizens must be allowed to resort to the neutral forum of a federal court in certain cases. For this reason, it has been consistently held that states could not, under the guise of prescribing the modes of redress in their courts or regulating the distribution of their judicial power, enact legislation impairing access to the federal courts. *Marshall v. Baltimore & O. R. Co. v. Henderson*, 57 U.S. 314 (1854); *Hyde v. Stone*, 61 U.S. 170 (1858); *Hayes v. Pratt*, 147 U.S. 557 (1893); *Blacker v. Thatcher*, 145 F.2d 255 (9th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945). A judicial decree of a state court does not differ in any legal respect from a statute enacted by a state legislature, and thus neither can impair access to the federal courts.

Amicus submits that the Alabama court decision which enjoins the petitioner from vindicating his rights in federal court is clearly violative of his constitutional rights of speech, to petition for a redress of grievances, and his property rights under the First, Fifth and Fourteenth Amendments. The denial of petitioner's constitutional rights is particularly egregious where certain of petitioner's claims raise federal issues which can be heard only in a federal court. Furthermore, the nature of those claims raise serious issues and seeks substantial damages for injuries suffered by the petitioner.[1] But even if the

[1] Despite respondents' irrelevant argument below that petitioner's claim was allegedly "harassing and vexatious", the Alabama Supreme Court made no such finding. *See* Pet. for Cert., App. A. If anything, *amicus* submits that petitioner should be commended for his persistence in seeking simply to have his day in court.

proposed suit were simply a mundane commercial law action, this Court has nevertheless found the First Amendment equally availing in such circumstances:

> The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political . . . . [W]here the litigation in question was . . . solely designed to compensate victims of industrial accidents, we rejected the contention . . . that the principles announced in *Button* were applicable only to litigation for political purposes.

United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 223 (1967).

Statutes regulating First Amendment freedoms must be *narrowly drawn* to prevent only that evil which it is within the power of the state to control. *Sheldon v. Tucker*, 364 U.S. 479 (1960); *Elfbrant v. Russell*, 384 U.S. 11 (1966). There can be no doubt that this central principle of constitutional law applies with equal force to court orders. The Alabama standard is not narrowly drawn; in fact, the opposite is true.

The Court below also committed reversible error when it implicitly accepted Circuit Judge Barber's claim that petitioner "failed to offer any evidence that the proposed action in the United States District Court did not involve the Empire Life receivership proceedings." Pet. for Cert., App. A at A2. In the first place, *amicus* submits that it is contrary to law and public policy to require petitioner to shoulder the burden of proving that the proposed exercise of his constitutional rights would not defeat the lower court's jurisdiction over the *res*; that burden more properly belongs on those seeking to deny petitioner his fundamental rights. In the second place, *amicus* submits that an examination of the proposed complaint and the entire record herein reveals that the proposed litigation

seeking only money damages will not "involve" or "interfere with" the Empire receivership proceedings. Finally petitioner submits that even if the proposed litigation "involves" or "interferes with" the receivership proceeding, that test is an overly broad one, is fraught with vagueness, and, in any event, is *not* the proper or legal test for determining whether petitioner may maintain a federal action during the pendency of the state receivership proceeding.

There is a distinct two-step process inherent in the Alabama circuit court's January 6, 1975 broadly worded injunction requiring that court's permission before the filing of any suit involving or relating to the receivership proceedings. The first step is the requirement that petitioner seek the prior approval of the Alabama court before filing a proposed action, a requirement that may be triggered in certain *broad* circumstances. The second step is the granting or denying of the request to file a proposed suit, the denial of which can be made only in very *narrow* circumstances. Thus, although petitioner may be required to first seek permission from the lower court if a proposed complaint vaguely "involves" the receivership proceeding, such permission cannot be denied by the state court under the *Donovan* doctrine unless the proposed federal action will in fact divest the state court of *jurisdiction* over the *res*. But in this case, the state court will not be deprived of jurisdiction by petitioner's filing of an *in personam* action. The lower court thus erroneously collapsed the two-step process into one, giving the impression that it believed that its authority to require *prior* application for leave to file a suit was coextensive with its authority to deny that application.

If the vague or overbroad test of "involves" or "interferes with" is allowed to stand, the Court will be sanctioning a wholesale violation of not only petitioner's rights, but the rights of many other citizens who find their conduct subject to state laws and injunctions similar

to those in the instant case. *See* Pet. for Cert., Apps. D, E. Receivership proceedings could last indefinitely and thus effectively be used to deny citizens the opportunity to vindicate their rights as long as the overbroad standard remains extant.

CONCLUSION

The Alabama Supreme Court's decision barring petitioner from filing an *in personam* suit in federal court is in clear conflict with this Court's decision in *Donovan* and violated petitioner's constitutional rights, including his right of access to the courts. Even if his proposed suit is "connected with" or would "interfere with" the receivership, it has not been demonstrated, nor could it be, that petitioner's *in personam* federal action would wrest control of the *res* from the state court, and thus, deprive it of jurisdiction over the receivership proceedings. The Alabama rule would set a dangerous precedent of permitting state courts to interfere with the jurisdiction of federal courts and preclude the litigation of substantial federal claims.

For all these reasons, *amicus* submits that the Alabama Supreme Court's decision is contrary to law and against sound public policy. The Washington Legal Foundation submits that this case raises important constitutional questions concerning the rights of petitioner and the proper functioning of our courts in a dual federal-state system as to warrant plenary review by this Court.

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